Petition

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

AETNA CASUALTY AND SURETY COMPANY,
Petitioner,

v.

CHARLES J. PORTER, AMERICAN OPTICAL CORPORATION, HARTFORD ACCIDENT & INDEMNITY COMPANY, CONTINENTAL INSURANCE COMPANY and AMERICAN MOTORISTS INSURANCE COMPANY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a federal court exercising diversity jurisdiction may properly refuse to follow and apply the substantive law of the forum state in determining a contractual dispute and place exclusive reliance upon an opinion rendered by a federal court which exercised diversity jurisdiction in another circuit.

2. Whether a federal court exercising diversity jurisdiction may determine a contractual dispute contrary to the prevailing authority and substantive law of the forum state.

3. Whether a federal court exercising diversity jurisdiction may, through exclusive reliance upon and adoption of an opinion rendered by a federal court which exercised diversity jurisdiction in another circuit, impose burden of proof prerequisites antithetical to the substantive law of the forum state.

LIST OF PARTIES

Pursuant to United States Supreme Court Rule 21.1(b), a list of parties to the proceeding in the court whose judgment is sought to be reviewed is not presented inasmuch as the caption of the case in this Court contains the names of all parties. A list of companies affiliated with the petitioner, Aetna Casualty and Surety Company, is, however, set forth in the attached Appendix "A".

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INTRODUCTORY PRAYER FOR RELIEF

The petitioner, Aetna Casualty and Surety Company, respectfully prays and requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on April 8, 1981.

OPINIONS BELOW

The judgment of the United States Court of Appeals for the Fifth Circuit, which reviewed a decision of the United States District Court for the Eastern District of Louisiana, was ren-

dered on April 8, 1981 and is reported at 641 F. 2d 1128, a copy of which opinion is annexed as Appendix "B". The opinion of the District Court for the Eastern District of Louisiana, rendered on November 27, 1977 and subsequently amended on March 28, 1978, is not officially reported. A copy of the slip opinion issued is annexed as Appendix "C".

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on April 8, 1981. No petition to the Fifth Circuit for a rehearing was filed. Pursuant to 28 U. S. C. § 2101(c), an application for an extension of time within which to file a petition for a writ of certiorari was presented to Mr. Justice Powell, Associate Justice of the Court and Chief Justice for the Fifth Circuit Court of Appeals, which application was granted on June 27, 1981, permitting a petition to be filed on or before September 7, 1981. Jurisdiction of this Court to review the judgment of the Fifth Circuit Court of Appeals is conferred by 28 U. S. C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Article III, Section 2, Clause 1:

> "The judicial power shall extend to all cases, in Law and Equity, arising under the Constitution, the Law of the United States, and Treaties made, or which shall be made, under their authority;—to all Cases affecting Ambassadors, other public Ministers and Counsels;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to controversies between two or more states;—between a State and Citizens of another State; between Citizens of different States;

—between Citizens of the same State claiming lands under grants of different states, and between a State, or the Citizens thereof, and foreign States, Citizens or subjects."

28 U. S. C. § 1652:

"The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

STATEMENT OF THE CASE

A.

Proceedings in the United States District Court

Proceedings were instituted in the United States District Court for the Eastern District of Louisiana, premised on diversity jurisdiction, for the illness and subsequent death of Charles J. Porter, resulting from asbestosis contracted while Mr. Porter was employed by the National Gypsum Company in New Orleans. Defendants in the proceeding included American Optical Corporation, the manufacturer of a respirator and filter apparatus provided to Mr. Porter for use in the course of his employment, as well as various insurers of American Optical Corporation during the period of the decedent's employment. The respirator apparatus was challenged as being defective in failing to prevent the disease.

Porter was employed by National Gypsum Corporation from sometime in the year 1950 until retirement in April of 1974, a retirement induced by virtue of his illness and resultant disabilities. In June of 1971, Mr. Porter was hospitalized for the first time on a matter referable to shortness of breath, and thereafter was hospitalized or seen by various physicians repeatedly due to respiratory related problems. During the period from 1971 through 1975, these respiratory difficulties were diagnosed as being of various etiologies and it was not until February of 1975 that a lung biopsy revealed that the decedent's illness was in fact asbestosis, from which illness Mr. Porter died in May of 1977.

Joined as defendants in the proceeding were the various insurance companies providing certain coverages to American Optical Corporation during the period of Mr. Porter's employment. Aetna Casualty and Surety Company provided liability insurance coverage from 1954 until January 1 of 1971. Hartford Accident and Indemnity Company similarly provided

coverage to American Optical Corporation for the period of January 1, 1971 through January 1, 1975. The Continental Insurance Company policy provided coverage from January 1, 1975 and remained in force and effect as of the date of the trial.

All of the policies issued by the three insurers were essentially standard in form and provided coverage for the legal liability of American Optical Company for bodily injury which was defined to include sickness or disease sustained by any person.

The trial court pointed out that the Aetna policy provided as follows: "The Company will pay on behalf of the insured all sums which the insured shall become legally liable to pay as damages because of . . . sickness or disease sustained by any person . . . to which this insurance applies caused by . . . continuous or repeated exposure to conditions which unexpectedly caused injury to persons during the policy period."

The trial court also pointed out that the Hartford policy provided: "The Company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of . . . sickness or disease sustained by any person . . . caused by . . . injurious exposure to conditions which results during the policy period in . . . sickness or disease. . .".

The District Court entered judgment on a verdict of the jury that the respiratory and filter apparatus provided to Charles J. Porter and used during the course of his employment with the National Gypsum Company was defective.

The United States District Court for the Eastern District of Louisiana, applying Louisiana law, also held that Hartford Accident and Indemnity Company provided coverage applicable for the judgment in the amount of one hundred fifty-five thousand dollars ($155,000.00) rendered against American Optical Corporation and accordingly dismissed claims against Aetna and Continental Insurance Company for any coverage associated with that judgment.

The trial court based its decision upon the fact that Mr. Porter did not manifest any injury, sickness or disease, during the existence of the coverage of the Aetna policies. The court found that Mr. Porter manifested disease and required treatment only after 1971 when the Hartford policies were in effect. The trial court rejected Hartford's contention that the liability of the insurance carrier should be measured by the "exposure theory" and that liability of the insurers was to be predicated on the number of years that the claimant was exposed to the insured's product rather than the time that the plaintiff's disease became manifest and required medical treatment.

B.

Proceedings In The Fifth Circuit Court Of Appeals

The judgments of the United States District Court were appealed to the United States Court of Appeals for the Fifth Circuit by American Optical Corporation and Hartford Accident and Indemnity Company. The appeal of American Optical Corporation was as to its liability to Charles J. Porter, and the appeal of Hartford Accident and Indemnity Company was from the District Court's determination of its insurance coverage responsibilities for the judgment.

The Court of Appeals, in a detailed opinion relating to the liability of American Optical, affirmed the judgment against American Optical Corporation. Petitioner, Aetna, does not dispute the determination of American Optical Corporation's liability for injuries sustained by Charles J. Porter and seeks no appeal from that determination.

The Court of Appeals then treated the very important insurance coverage issue in perfunctory fashion.

With respect to the insurance coverage issue the Court stated, "[t]he real question is whether insurance liability for injury from a cumulative, progressive, disease, such as asbes-

tosis, should be apportioned among various insurers at a pro rata basis according to an 'injurious exposure' approach or, instead, should be applied to only one of the insurers under a 'first manifestation' theory".

The Court did not examine the policies which the trial court interpreted and which provided coverage for American Optical for its liability for "injury to persons during the policy period" (the Aetna policies) and "which results during the policy period in ... sickness or disease ..." (the Hartford policy).

The Court assumed that the insurance contracts were made in Louisiana and that Louisiana law would and should control their interpretation. However, following its determination of the controlling nature of Louisiana law, the Fifth Circuit Court of Appeals then looked not to Louisiana law, but exclusively to a decision from the United States Court of Appeals for the Sixth Circuit in *Insurance Company of North American* v. *Forty-Eight Insulations, Inc.*, 633 F. 2d 1212 (6th Cir. 1980), wherein that Court rejected the "manifestation" theory of insurance coverage in asbestosis cases and instead accepted the "injurious exposure" theory requiring that liability insurance coverage be prorated among all the carriers for liability resulting from exposure to asbestos products. Ignoring its previous determination that the substantive law of Louisiana was controlling in the resolution of the contractual dispute, the Court adopted the reasoning of the Sixth Circuit Court of Appeals in *Forty-Eight Insulations*. Without explanation, and more importantly, without reference to Louisiana state law, the Fifth Circuit accepted the theory as adopted by the Sixth Circuit Court of Appeals and the requirement of proration of liability among insurance carriers and reversed the judgment of the United States District Court, requiring that the cause be remanded "for proration of coverage between Aetna and Hartford in keeping with the teachings of the Sixth Circuit opinion".

The Fifth Circuit did so, despite the holdings of Louisiana substantive law which require that damage occur during the term of a liability policy for coverage to attach.

Accordingly, the decision of the United States District Court for the Eastern District of Louisiana, a determination premised on substantive law of the State of Louisiana, was reversed without explanation by virtue of the Fifth Circuit Court of Appeals' exclusive reliance and dependence upon the reasoning of another federal court in another circuit under another set of facts. Louisiana substantive law, although noted and expressly found by the court to be controlling, was totally ignored in preference for the "teachings of the Sixth Circuit opinion".

REASONS FOR GRANTING THE WRIT OF CERTIORARI

A.

The Opinion of the Fifth Circuit Court of Appeals, Rendered in Total Contravention of *Erie* v. *Tompkins*, Has Enormous Potential Impact Upon the Efficient Allocation of Scarce Judicial Resources, and Mandates This Court Review and Consider the Manner in Which Standard Form Contracts of Liability Insurance Extend Coverage to the Asbestos Related Diseases.

The opinion of the Court of Appeals for the Fifth Circuit is in clear violation of the doctrine of this Court in *Erie R. Co.* v. *Tompkins*, 304 U. S. 64 (1938). The Court of Appeals totally ignored controlling Louisiana law and adopted without analysis an opinion of the Sixth Circuit in a somewhat similar case.[1]

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[1] *Insurance Company of North America* v. *Forty-Eight Insulations, Inc.*, 633 F. 2d 1212 (6th Cir. 1980).

That opinion, purporting to follow the law of New Jersey and Illinois, creates both a rule of contract interpretation and a rule of burden of proof, each of which is directly contrary to the law of the State of Louisiana.

The circumstances and nationwide importance of the issue presented for the Court's consideration is such that an "exceptional case" is indeed presented wherein the determination of state law by an intermediate federal appellate court should and ought to be reviewed. *Huddleston* v. *Dwyer*, 322 U. S. 232 (1944).

That the opinion of the Court of Appeals is contrary to *Erie* in two important and basic respects will be demonstrated shortly hereafter. However, the magnitude of the error committed by the Fifth Circuit cannot be comprehended unless the ramifications of its decision are understood.

This case involves the interpretation by the Fifth Circuit of standard form liability insurance policies as applied to a single case of asbestos related disease. However, there are currently pending in the federal and state courts thousands of cases brought by persons suffering from asbestos-related diseases[2] and the number of these pending cases has been growing by a

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[2] In *Migues* v. *Nicolet Industries*, 493 F. Supp. 63 (E. D. Tex. 1980), the court demonstrated the existence of the drastic quantity of asbestos-related cases. In that district alone, more than 2,400 plaintiffs have filed claims. 493 F. Supp. at 64. Further, in *Keene Corporation* v. *Insurance Company of North America*, 513 F. Supp. 47 (D. D. C. 1980), the court noted, with reference to the dramatic number of suits filed just against Keene Corporation, that "[r]ecently, more than 5,000 cases have been filed against Keene or its predecessors, alleging personal injury or wrongful death as a result of the use of its products which contained asbestos insulating material." 513 F. Supp. at 48.

geometric progression.[3] It is not unreasonable to predict the pendency of 50,000 to 100,000 asbestos related disease cases within the next few years.[4]

Most of the funding for the defense, settlement and payment of judgments in these cases comes from insurance companies, such as Aetna, which have issued standard form general liability insurance policies to manufacturers of asbestos products who are the defendants in the pending disease cases. Unfortunately, there is no unanimity among insurance carriers, nor among the companies insured, as to the proper method of application of the liability insurance policies. Aetna and many other major insurers following their traditional practice have defended, settled and paid judgments in asbestos related disease cases on the basis of the manifestation interpretation of coverage. This approach to policy interpretation is buttressed on the fact that disease which manifests itself during the policy period "occurs" during the policy period for purposes of insurance coverage and places an obligation on the insurance carrier for the defendant during that year to both defend the company sued and to pay any judgments entered against the company.

Certain insurers and certain insureds have taken an alternative position that the policy should be interpreted under a so-called "exposure" approach to coverage whereby each

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[3] "As of the date of the district court opinion, Forty-Eight had been named in 251 'asbestos suits'. By the end of 1978, Forty-Eight had over 800 such suits filed against it. By the summer of 1979, over 1,370 claims were filed." *Insurance Company of North America* v. *Forty-Eight Insulations, Inc.*, 633 F. 2d 1212, 1215 (6th Cir. 1980). The rapid geometric expansion in asbestos litigation experienced by Forty-Eight Insulations is not atypical for the industry.

[4] Although some predictions are even higher, it has most recently been estimated that the number of new lawsuits has been increasing at the rate of 400 cases monthly. N.Y. Times, July 3, 1981, § 1, p. 1, col. 1.

insurance carrier insuring a company over the years that an individual plaintiff was exposed to an insured's products must pay a proportionate share of the defense and settlement expenses, and the insured pays a proportionate share of these expenses if uninsured for a given year. It is the latter theory which the opinion of the Court of Appeals adopts. Unfortunately, not only is the "exposure" approach to coverage unsupported by logic or legal authority, but it also contains within itself, the seeds of massive and multitudinous litigation which will result from future attempts to apply this doctrine. The following are some of the unresolved, and perhaps unresolvable, problems arising from the opinion of the Fifth Circuit.

The opinion of the Court of Appeals leaves completely unanswered the basic question as to which insurance company of perhaps six or eight which are obligated to a given insured under the "exposure" theory will control the defense of a given case or series of cases. When it is realized that there are perhaps ten to twenty defendants in each asbestos related disease case and that this issue will arise as to each of these defendants and will involve perhaps six or eight insurance carriers as to each of the ten to twenty defendants, the complexity of the problem becomes apparent. The potential for litigation arising out of each of such situations is enormous and almost beyond comprehension.

A second critical deficiency in the practical application of the doctrine adopted by the Court of Appeals is that incredible conflict of interest situations will develop for attorneys defending asbestos manufacturers. The attorneys, whether selected by one or more insurers or by the insured, will be placed in an intolerable position in attempting to assess not only the potential liability of their client, but also in attempting to obtain a rational proration of defense and settlement costs from the various carriers insuring their client. Litigation arising from such conflicts is certain to mushroom as a result of the Court of Appeals opinion.

A third serious problem created by the Court of Appeals opinion is the fact that under the exposure theory of coverage it will be much more difficult to settle asbestos related disease cases. The sheer magnitude of assessing liability and apportioning the potential liability of each of ten to twenty defendants among the six, eight or ten insurance carriers of each for the purpose of obtaining agreements to settle present problems that are perhaps insoluble. If so, trials of most of the asbestos disease cases, otherwise subject to settlement, will be required simply because of the difficulty of reaching agreement on insurance coverage issues.

Finally, the exposure theory of coverage adopted by the Court of Appeals will provoke perhaps thousands of separate suits to allocate the defense, settlement and judgment obligations of the insurers in individual asbestos related disease cases of which there are, as noted earlier, thousands now pending and more imminent. These disputes will not only involve the insurers providing primary insurance coverage for the various manufacturers, but also insurers providing excess coverage for the same manufacturers and reinsurers of both the primary and excess carriers.

The orderly and efficient administration of these thousands of asbestos related claims will become exceedingly difficult because of the irreconcilable dispute among the various insurance companies as to the proper interpretation of coverage. The decision of the Fifth Circuit Court of Appeals only serves to subject the coverage issue to further controversies. Resolution of this fundamental question of contract interpretation by this Court will have important practical and meaningful consequences with respect to all these asbestos lawsuits for the claimants, insured corporations and for the insurance industry as such a resolution will authoritatively determine responsibility for the administration, defense, settlement, trial and appeal of these same lawsuits.

Approximately twenty major cases involving the issue of the proper measure of insurance coverage in asbestos related disease cases, other than the *Porter* case and the case of *Insurance Company of North America* v. *Forty-Eight Insulations*, 633 F. 2d 1212 (6th Cir. 1980), Petitions for Writ of Certiorari pending, are now being litigated throughout the United States. The decision of the Court of Appeals for the Fifth Circuit creates so many problems of such potential magnitude that litigants in the other coverage cases will undoubtedly continue to contest through every available means the issue of insurance coverage for asbestos related disease cases. Given the complexity of some of these cases[5] it is probable that burdens will be placed on both the federal courts and the state courts for years in attempting to resolve this issue.

There is only one effective way in which this problem can be terminated without the spectre of incredible litigation over insurance coverage throughout the next decade. If this Court should examine the problem of insurance coverage and provide to the litigants a decision with guidelines by which insurers for various manufacturers can determine their obligations and fulfill them, it is difficult to conceive of any litigants further contesting this matter in any court or, if contested, to imagine any court reaching a result contrary to this Court.

The solution that Aetna would urge upon this Court, if the writ were to be granted, is adoption of the manifestation theory of coverage. Under this interpretation of insurance policy contracts, the single insurance company insuring a company at

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[5] The Court of Appeals for the Sixth Circuit has acknowledged the magnitude of this problem by describing the number of asbestos related lawsuits filed against that industry as "an avalanche." 633 F. 2d at 1215. The absolute sheer volume of asbestos litigation is threatening to stultify our judicial system and the pending cases represent the largest, and potentially most costly block of product liability claims ever to confront American industry. N.Y. Times, July 3, 1981, § 1, p. 1, col. 1.

the time a plaintiff's asbestos related disease becomes manifest by diagnosis, disability, death or symptomatology, is totally responsible to that insured for its liability to the plaintiff. No problem is created as to which insurer will control the case. No conflict of interest will arise for the attorney defending that insured since only one insurance company is obligated to pay a judgment. Settlement of asbestos related cases will be expedited and simplified because only one insurer, not six or eight, will necessarily decide on settlement for each defendant. Under the manifestation interpretation of the policies, there need be no subsequent litigation among insurance carriers relative to proration of expenses in individual cases after judgment. Finally, the manifestation theory of coverage is supported not only by the law of the State of Louisiana but supported by significant authority through the country.[6]

While this petition involves a single judgment in a single asbestos related disease case, its importance to tens of thousands of litigants cannot be overstated because of its effect on other pending litigation.

The clear error of the Court of Appeals for the Fifth Circuit and the basis for this Court granting certiorari are hereinafter set forth.

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[6] *United States* v. *Kubrick*, 444 U. S. 111, (1979); *Urie* v. *Thompson*, 337 U. S. 163, (1949); *Goodman* v. *Mead Johnson & Company*, 534 F. 2d 566 (3rd Cir. 1976); cert. denied, 429 U. S. 1028, (1977); *Roman* v. *A. H. Robins Co.*, 518 F. 2d 970 (5th Cir. 1975); *Schenebeck* v. *Sterling Drug Inc.*, 423 F. 2d 919 (8th Cir. 1970); *Brush Berylium Co.* v. *Meckley*, 234 F. 2d 797, (6th Cir. 1960); *Sylvania Elec. Prods., Inc.* v. *Barker*, 228 F. 2d 847 (1st Cir. 1955), cert. denied, 350 U. S. 988, (1956).

B.

The Decision of the Court of Appeals Is in Flagrant Violation of the Rule in *Erie*. The Court Purported to Apply Louisiana Law but Cited No Louisiana Opinions Supporting Its Decision and Totally Ignored the Law of Insurance Contracts as Enunciated by the Courts of Louisiana.

Charles J. Porter, the plaintiff in the case, contracted an asbestos related disease while working as an employee of the National Gypsum Company in New Orleans, Louisiana. His claim against the American Optical Company was predicated on the alleged failure of a respirator and filter apparatus supplied by American Optical Corporation and which he used while working with asbestos products for National Gypsum Company to prevent his contracting the disease. No issue is raised as to the propriety of the judgment in favor of Mr. Porter against American Optical or the decision of the Court of Appeals affirming that judgment.

However, because Louisiana law permits the joinder as defendants of liability insurers for alleged tort feasors, the insurers for American Optical were also defendants in this action. Aetna had insured American Optical from 1954 to 1971. Hartford had insured American Optical from 1971 to 1975. Continental had insured American Optical from 1975 to 1978.

The trial court held that Louisiana law controlled interpretation of the contracts and, relying upon Louisiana authority, determined that Hartford was solely liable under its policy for the injuries sustained by Mr. Porter because its policy was in effect when Mr. Porter's disease manifested itself.

The trial judge in this case is the only judge in the United States to date who has interpreted standard liability policies to determine coverage in the light of specific evidence relating to the disease of a specific plaintiff. The trial court did so, and

applying Louisiana law, stated: "Aetna's policy expired on January 1, 1971 and Mr. Porter's initial hospital admission for shortness of breath did not occur until June of the year. Accordingly, Mr. Porter did not sustain bodily injury as the result of an occurrence during Aetna's policy period. Aetna's policies covering American Optical from 1954 through January 1, 1971 do not provide coverage for the claims on behalf of Mr. Porter herein."

The Court of Appeals agreed with the trial court that Louisiana law controlled interpretation of the policies.[7] However, after so holding, the Court then stated:

> "We might prolong this already lengthy opinion by paraphrasing or rephrasing the Sixth Circuit opinion.[8] We are content to say that we agree with its reasoning and result. Under the terms of the policies presently before us, we reject the 'manifestation' theory. We accept the 'injurious exposure' theory and the logically consequent rule of proration of liability for insurance carriers who are on the coverage while the injured party was exposed to the asbestos hazard which resulted in illness and death."

The Court of Appeals did not refer to a single Louisiana opinion regarding insurance coverage. The only reference to *any* opinion relating to insurance coverage was its reference to the *Insurance of North America* case.[9]

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[7] "We assume in the absence of a showing to the contrary, that these insurance contracts were made in Louisiana, or in a state where the law would be the same as that of Louisiana." 641 F. 2d at 1145.

[8] *Insurance Company of North America* v. *Forty-Eight Insulations, Inc.*, 633 F. 2d 1212 (6th Cir. 1980).

[9] The Court of Appeals for the Sixth Circuit in that case acknowledged it must apply Illinois and New Jersey law. 633 F. 2d at 1219.

In view of the result it reached, the failure of the Court of Appeals to cite any controlling Louisiana authority is not surprising. The Supreme Court of Louisiana has held in the case of *Oceanonics, Inc., et al.* v. *Petroleum Distributing Company, et al.*, 292 So. 2d 190, (La. 1974), that under Louisiana law a liability insurance policy does not apply to an accident where the damage did not result during the policy period. This holding would totally negate any "exposure" theory of coverage.[10]

Similarly, the Court of Appeals of Louisana in the cases of *Mut* v. *Newark Insurance Company, et al.*, 289 So. 2d 237, (La. App. 1973), and *Taillac* v. *Westminster Corporation, et al.*, 320 So. 2d 580, (La. App. 1975), has held that an insurance carrier is not liable for damage not occurring during the policy period of the policy issued by the insurer.[11]

These decisions, which involve property damage rather than bodily injury, at the very least raise the presumption that the Louisiana courts would adopt the manifestation theory of coverage if called upon to decide the issue decided by the Fifth Circuit.

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[10] The statement of the Louisiana Supreme Court in so holding was both strong and clear. "In the absence of a conflict with statutes or with public policy, insurers have the same rights as do individuals to limit their liability and to enforce whatever conditions they please upon their obligations. In such an event unambiguous provisions in the insurance contract limiting liability must be given effect. *Niles* v. *American Bankers Insurance Co.*, 258 So. 2d 705 (La. App. 1972). We find that in this instance Market had the right to limit its liability to property damage which occurred during the policy period . . . Our conclusion is that no coverage was provided in the Market policy since the property damage did not occur during the policy period." 292 So. 2d at 192.

[11] The opinion of the Fifth Circuit imposes liability on insurers for disease not resulting during the period insured for the sole reason that the insurers' policies were in effect at the time the claimant was exposed to the insureds' asbestos products.

Under *Erie*, the Fifth Circuit is mandated to follow the interpretations of Lousiana law by the Louisiana courts as to the applicability of liability insurance policies.[12] In its decision, the Court of Appeals not only did not do so, but failed to acknowledge the existence of the significant holdings under state law by the Louisiana Supreme Court and Court of Appeals.[13] If *Erie* means anything at all, it means that a federal court must determine what the state law is, rather than finding and prescribing for the state "a different rule, however superior it may appear". *West* v. *American Telephone & Telegraph Co.*, 311 U. S. 223, 237 (1940).

The fact that the Fifth Circuit totally ignored Louisiana law on this basic issue of contract interpretation, as mandated by *Erie*, is incomprehensible unless it be assumed that the Fifth Circuit, having been made aware of the tremendous scope of asbestos insurance company litigation, felt obligated to reach a result consistent with the Sixth Circuit in the *INA* case. This it certainly did, not only by igonoring Louisiana law, but by

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[12] Ironically, in opinions filed subsequent to the *Porter* case, the Fifth Circuit again acknowledged its responsibility to follow state law in an insurance policy interpretation case, *ABA Distributing, Inc.* v. *Lumbermens Mutual Insurance Co.*, 646 F. 2d 207 (5th Cir. 1981), and in a contract interpretation case, involving Louisiana law, *Intercontinental Engineering-Manufacturing Corp.* v. *C. F. Bean Corp.*, 647 F. 2d 621 (5th Cir. 1981).

[13] Significantly, the Fifth Circuit recently reversed a United States District Court for failing to follow Louisiana law and stated: "Abracadabra: The Mysterious Disappearance of the Erie Doctrine. Apparently ignoring the Erie Doctrine and pertinent precedent, the trial court refused. . .", *Murphy* v. *Georgia-Pacific Corp.*, 628 F. 2d 862, 869 (5th Cir. 1980).

setting forth no rationale to support its opinion and summarily, in four sentences, adopting the opinion of the Sixth Circuit in the *INA* case.[14]

The fact that the Fifth Circuit totally ignored Louisiana law creates the possibility, if not probability, that the Louisiana courts if called upon to consider the insurance coverage issue in a subsequent case would disregard the Fifth Circuit opinion and decide, under Louisiana authority, that the manifestation theory of coverage was the proper means by which to interpret the policies. The practical difficulties ensuing from such conflicting decisions do not need elaboration.

The concern of the Court of Appeals for the magnitude of the problem involved in insurance policy interpretation related to asbestos disease cases is understandable and its desire for uniformity is commendable. However, the court's decision constitutes a flagrant violation of this Court's teaching in *Erie* and its progeny and should not be permitted to stand. Ample reason exists for this Court to exercise its jurisdiction.

C.

The Court of Appeals for the Fifth Circuit Also Violated the Rule in *Erie* by Adopting an Opinion Which Creates a Burden of Proof Antithetical to Louisiana Law.

Not only does the decision of the Court of Appeals for the Fifth Circuit totally ignore Louisiana authority and reach a result opposed to the interpretation of insurance policy con-

[14] The effect of the Sixth Circuit opinion cannot be overestimated. The United States District Court for the District of Columbia in the case of *Keene Corporation* v. *Insurance Company of North America, et al.*, 513 F. Supp. 47 (D. D. C. 1981), also adopted, without independent analysis, the opinion of the Sixth Circuit in a parallel case. An appeal from this judgment has been argued before the United States Court of Appeals for the District of Columbia and is pending decision. The District Court in the *Keene* case does not in its opinion indicate under what law of which state it reached its decision.

tracts under Louisiana law, but the court further violated *Erie* by adopting a rule antithetical to Louisiana law relating to the burden of proof.

The Court of Appeals, as noted above, reached its decision in four sentences without setting forth any rationale or citing a single Louisiana case. The Court merely adopted the entire decision of the Sixth Circuit in the *INA* case by stating, "We are content to say that we agree with its (Sixth Circuit) reasoning and result."

In so doing, the Court not only ignored Louisiana law of the interpretation of contracts but adopted a particularly insidious ruling of the Sixth Circuit in the *INA* case which is also directly contrary to Louisiana law. In analyzing the "exposure" theory espoused by it, the Sixth Circuit noted the potentially incredible difficulties in determining coverage under this rule and acknowledged that the "general rule" is that the burden of proof to show coverage is on the insured. However, the Sixth Circuit, because of what it termed "unique circumstances" stated: "We simply reverse the ordinary burden of proof and place it on the insurer." 633 F. 2d at 1226, n. 27. Such a ruling is in direct contravention of Louisiana law, the existence of which the Fifth Circuit did not even acknowledge.

Under Louisiana law the burden of proof is upon an insured, where coverage is disputed, to establish that a claim is within the coverage of the insurance policy contract.[15] This fundamental rule of insurance policy interpretation is followed in virtually all states.[16]

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[15] *Roy* v. *Commercial Union Assurance Co.*, 385 So. 2d 1273 (La. App. 1980); *Boyd* v. *White*, 123 So. 2d 835 (La. App. 1960); *Ceasar* v. *Great Falls Insurance Company*, 371 So. 2d 1286 (La. App. 1979).

[16] *See* Appleman, Insurance Law and Practice, § 12091 *et seq.* where, in Part 79 of the text, citations to numerous state decisions are presented and the general acceptability of this proposition is acknowledged.

It can not be expected that the Louisiana courts would follow the opinion of the Fifth Circuit relative to burden of proof when it is in direct contradiction to established Louisiana precedent. Again, the practical consequences of conflicting decisions in subsequent litigation is almost unimaginable.

In diversity cases the burden of proof is a matter of substance and under *Erie* must be governed by state law.[17] A federal court is not at liberty to ignore state law on this issue.[18]

Aetna can understand the concern of the Fifth Circuit for consistency in the very important decisions relating to insurance coverage for asbestos related diseases. However, consistency cannot be achieved by ignoring state law and adopting rules, no matter how expedient in the eyes of the court, directly contrary to state law.

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[17] *Dick* v. *New York Life Insurance Co.*, 359 U. S. 437 (1959); *Palmer* v. *Hoffman*, 328 U. S. 109 (1943); *Garrett* v. *Moore-McCormack Co.*, 317 U. S. 239 (1942); *Cities Service Oil Co.* v. *Dunlap*, 308 U. S. 208 (1939); *Central Vermont Ry.* v. *White*, 238 U. S. 507 (1915); *See also United States* v. *Wiring, Inc.*, 646 F. 2d 1037 (5th Cir. 1981). Ironically, in *United States* v. *Wiring, Inc.*, an opinion filed shortly after the *Porter* opinion, the Fifth Circuit reversed a U. S. District Court for failure to apply the state law relative to burden of proof, stating: "In diversity cases, it appears to be settled that the ultimate burden of proof on an issue is a matter of substance and, hence, under *Erie Railroad* v. *Tompkins*, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 2288 (1938), is governed by state law. *Palmer* v. *Hoffman*, 318 U. S. 109, 63 S. Ct. 477, 87 L. Ed. 645 (1943); *Cities Serv. Oil Co.* v. *Dunlap*, 308 U. S. 208, 60 S. Ct. 201, 84 L. Ed. 196 (1939); see generally 5 C. Wright & A. Miller, Fed. Practice and Procedure § 1272." 646 F. 2d at 1042. It is of no moment that no burden of proof issue was presented in the *Porter* case. The opinion of the Sixth Circuit will still stand as precedent for this extraordinary holding.

[18] *Klaxon Co.* v. *Stentor Electric Manufacturing Co.*, 313 U. S. 47 (1941); *Guaranty Trust* v. *York*, 326 U. S. 99 (1954); *Byrd* v. *Blue Ridge Rural Electric*, 356 U. S. 528 (1958); *Hanna* v. *Plumer*, 380 U. S. 460 (1965).

This Court has not hesitated on other occasions to grant certiorari to review decisions of the courts of appeal which violate the *Erie* doctrine.[19]

Only by the exercise of its jurisdiction can this Court rectify the action of the Fifth Circuit which so blatantly violates this Court's teaching in *Erie* v. *Tompkins* and contains the seeds of such discordant litigation for years to come.

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[19] *West* v. *American Telephone & Telegraph Co.*, 311 U. S. 223 (1940); *Six Companies of California, et al.* v. *Joint Highway District No. 13 of the State of California*, 311 U.S. 180 (1940); *Stoner* v. *New York Life Insurance Co.*, 311 U. S. 464 (1940).

CONCLUSION

Aetna Casualty and Surety Company, for the reasons hereinabove set forth, respectfully requests that this Court issue the writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit in the instant case.

Dated July 31, 1981

Respectfully submitted,

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APPENDIX

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APPENDIX "A"

COMPANIES AFFILIATED WITH AETNA CASUALTY AND SURETY COMPANY, PETITIONER

The parent company of Aetna Casualty and Surety is Aetna Life & Casualty, and its affiliates include: Aetna Life Insurance Company; Aetna Life Insurance and Annuity Company; Aetna Life Insurance Company of Illinois; The Excelsior Life Insurance Company of Canada; Aetna Life & Casualty, Limited, Australia; Aetna Life & Casualty (Bermuda Ltd.); Aetna Life and Casualty Company; The Aetna Casualty and Surety Company; The Standard Fire Insurance Company of Hartford; The Automobile Insurance Company of Hartford, Connecticut; Aetna Casualty & Surety Company of Illinois; Aetna Casualty & Surety Company of America; American Reinsurance Company; Aetna Casualty Company of Canada; Urban Investment and Development Co.; Ponderosa Homes; Satellite Business Systems; Geosource, Inc.

APPENDIX "B"

Charles J. PORTER, Plaintiff-Appellee,

v.

AMERICAN OPTICAL CORP. and Hartford Accident & Indemnity Company, Defendants-Appellants,

v.

AETNA LIFE & CASUALTY INSURANCE CO., and Continental Insurance Co., Defendants-Appellees,

American Motorists Ins. Co., Intervenor-Appellee.

United States Court of Appeals, Fifth Circuit.

April 8, 1981.

Products liability action was brought against manufacturer of respirator and filter apparatus for damages resulting from asbestosis contracted while plaintiff's decedent was a factory employee and while he was supposed to have had the protection of the respirator and filter apparatus. The three insurance companies which, at various times, had insured the manufacturer during most of the decedent's employment and illness were joined as defendants. The United States District Court for the Eastern District of Louisiana, Charles Schwartz, Jr., J., rendered judgment against the manufacturer and against the insurance company that had insured the manufacturer when the asbestosis first manifested itself. Manufacturer and insurance company appealed. The Court of Appeals, Coleman, Circuit Judge, held that: (1) evidence that the respirator apparatus was defective in design and unreasonably dangerous for normal use was sufficient for the jury, and (2) insurance liability from asbestosis should be apportioned among the insurers on a pro

rata basis according to an "injurious exposure" approach, rather than being applied to only one of the insurers under a "first manifestation" theory.

Affirmed in part, reversed in part, and remanded.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before COLEMAN, REAVLEY and ANDERSON, Circuit Judges.

COLEMAN, Circuit Judge.

The gravity of this case for the parties concerned, including the novelty of the issues presented with reference to insurance coverage, has inspired prolonged consideration and reconsideration, to the end that an appropriate disposition might be made.

I. *The Nature of the Litigation*

This diversity action was originally brought by Charles J. Porter, now deceased, for damages resulting from asbestosis contracted while he was an employee of the National Gypsum Company in New Orleans and while Porter was supposed to have had the protection of respirator and filter apparatus supplied by the American Optical Corporation (American Optical). Porter subsequently died from his illness and the members of his family were substituted as parties plaintiff.

The primary defendant was American Optical. Also joined as defendants were three insurance companies which, at various times, had insured American Optical (*not* National Gypsum) during most of Porter's employment and illness: Aetna Casualty and Surety Company (Aetna), Hartford Accident and Indemnity Company (Hartford), and Continental Insurance Company (Continental).

By its verdict, the jury found the American Optical respirator and filter apparatus to have been defective and a proximate cause of Porter's resulting illness and death. Damages were awarded in the sum of $155,000.

Thereafter, in adjudicating the liability of the insurance companies the District Court held that Hartford alone provided the insurance coverage for the American Optical loss. The claims against Aetna and Continental were dismissed.

Consequently, we are now presented with "two appeals in one". American Optical appeals its primary liability. Hartford appeals the determination of its insurance coverage.

We affirm the judgment against American Optical.

We affirm that part of the judgment which absolved Continental of insurance coverage.

We reverse the judgment as to the insurance coverages of Aetna and Hartford.

We remand the case for an apportionment of coverage (liability) as between Aetna and Hartford.

We hold that the District Court erred when it measured insurance coverage by the "manifestation" standard. Instead, it should have used the "exposure" standard and should accordingly have pro-rated insurance liability coverage.

II. *The Liability of American Optical*

Porter instituted this suit in July, 1975. He died about two years later. His wife and daughters have pursued the litigation. On two grounds, the suit sought damages from American Optical for the injury and death of Porter: (1) defective design in the respirator apparatus which was unreasonably dangerous and a proximate cause of the injury to Porter, and (2) negligence of American Optical in failing to warn Porter of dangers inherent in the use of the respirator apparatus, also a proximate cause of the injury in question. In addition to facts relating to the structure of the National Gypsum plant and Porter's working habits and health record, the jury trial, consisted largely of expert testimony offered by both sides concerning design and performance of the respirator apparatus and the credibility given to this testimony.

1. *The National Gypsum Plant*

The National Gypsum Company is a manufacturer of building materials which includes sheetrock, asbestos wall boards, and other asbestos-cement roofing and siding products. The three main ingredients used by National Gypsum in its manufacturing process were cement, asbestos, and silica. These three materials are mixed together, combined with water, molded into a slab form, and left to dry to produce a final product. Because of the dusty atmosphere produced by the handling of these ingredients, National Gypsum required all employees in certain areas to wear protective respirators and filters as a preventive against respiratory ailments. Since 1953, these respirators were supplied to National Gypsum by the American Optical Corporation.[1]

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[1] Trial testimony does not reveal whether or not American Optical furnished respirators from the time Porter was first employed in 1950. American Optical did furnish them starting in 1953 and during the time it was insured by Aetna, Hartford, and Continental. The testimony of National Gypsum Supervisor Lincks reveals this:

Q. Now, in the course of working at National Gypsum, Mr. Lincks, was Mr. Porter required to wear a respirator?

A. In certain areas, yes.

Q. And, is this true throughout his working there from 1953, let's say, until the present?

A. Yes, sir.

Q. Do you recall, Mr. Lincks, what type or what kind of respirator you were using at National Gypsum from 1953 to the present?

A. I'm not too familiar with the numbers, but I remember R-2000 series and later probably going to a R-5000 series.

Q. Do you know who the manufacturer of that respirator was?

A. American Optical.

Q. Do you know of any other type of respirator other than one manufactured by American Optical Company that was in use at National Gypsum at this period of time?

A. No, sir.

Q. That's the only manufacturer?

A. Yes.

The National Gypsum plant in New Orleans consists of two buildings. One is a large building usually referred to as the main plant. The other is a much smaller building located in the rear, adjacent to railroad tracks, referred to as the cement pump house. Cement and silica are delivered to the plant by railroad gondola cars. The cement and silica are pumped out of these cars into storage tanks in the cement pump house, where they are in turn pumped into the main building. The pump in the pump house malfunctions at times and releases a cloud of dust throughout the pump house area.

Asbestos is delivered to the plant in packages, is removed from railroad cars by a lift machine, and is stored in a warehouse in the main plant. Consequently, it never passes through the smaller pump house.

The main plant has three floors, used for various purposes. Prior to 1972, according to the plant manager, there were no printed signs placed in the plant to indicate working areas that required the use of a respirator. All employees were informed by supervisors and safety personnel of specific areas that required respirator use, however, and were continually checked by the supervisors to ensure the wearing of the breathing apparatus. Outside continuous dusty areas, the employees were to use their own judgment concerning dust levels and the need to wear the respirator. Areas requiring the respirator included the second and third floors of the main plant and the cement pump house. In 1972, after the enactment of the Occupational Safety and Health Act (OSHA), signs were placed at various places in the plant to indicate mandatory respirator areas. These areas included part of the second floor of the main plant where the various particles were mixed together, the third floor, and areas where sawing and sanding operations were conducted. The first floor did not require use of the respirator.

2. *Asbestos Particles and Asbestosis*

Asbestos is a mineral easily separable into long flexible fibers. Its particles are not of uniform shape or size. The Occupational Safety and Health Administration classifies asbestos fibers by six different types. Each type has a different length, texture, strength, acid resistance, and flexibility.[1A] The number of small asbestos fibers that will pass through the filter of a respirator, therefore, may be dependent on the particular types of asbestos particles present in the atmosphere of employment.[2]

In the working atmosphere of a plant such as National Gypsum, the air is full of minute asbestos dust particles not visible to the eye. While a certain number of the particles are present throughout the plant, the concentration is highest where the asbestos is stored, handled or mixed.[3] Continuous breathing of asbestos-laden air will cause an eventual concentration of the particles in the lung tissue. Once in the lung, the particles cannot be coughed out and remain there permanently. The

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[1A] During cross-examination, Dr. Bruce Held, an expert witness offered by defendants, admitted that there were different types of asbestos particles. He specifically named two types, crocidolite and amianthus, but could not recall all the types. The attorney for the plaintiff discussed three additional types—cross fibers, slip fibers, and mass fibers—listed in a publication called "Asbestos" put out by the Bureau of Mines of the United States Department of Interior.

[2] The size, shape, strength, texture, and flexibility of various asbestos fibers may affect the ability of the fibers to pass through a filter. Fibers which have a smooth surface and high flexibility are more likely to pass through a filter. Those with a rough surface and hard texture are more likely to be trapped by a filter screen.

[3] Testimony revealed that asbestos particles are present in all breathing environments. Almost all persons in an urban setting, therefore, are likely to breathe in a small number of asbestos particles. No danger is present, however, unless a substantial number of particles are inhaled from an area concentrated with the fibers.

noxious effect of these rock particles causes the body to set up an inflammation until eventually fibrosis occurs. Through fibrosis the body lays down scar tissue in the lung surrounding the asbestos fibers. With a large concentration of the fibers lodged in the lung cavities, scar tissue eventually replaces most of the healthy lung tissue, disrupting the intake of air into lung air sacs and causing a shortness of breath. A sufficiently high concentration and buildup of the condition will cause death. This process, called asbestosis, can also be a precipitating cause of other illnesses such as emphysema, bronchitis, and pneumonia.

Asbestosis is a cumulative and progressive disease. It does not occur overnight after breathing in a substantial number of asbestos particles during the day. Rather, the disease is a culmination of body reaction to the particles inhaled during years of exposure. The disease is slow in nature and may require from ten to twenty years from onset to fully manifest itself. Persons may develop asbestosis long after they have left contact with an asbestos environment. Continuous exposure to asbestos particles, however, prods the disease at a greater rate. Even though the body has begun a reaction to the fibers, inhalation of new fibers adds to the lung inflammation and accelerates injury. Due to this progressive nature, it is generally quite difficult, if not impossible, to assign manifestation of the disease to a specific date.

3. *Charles Porter's Employment and Illness*

Charles Porter was first employed at National Gypsum in 1950. His early jobs with the plant included clean-up work and stacking sacks of fiber in the main plant. Porter worked around dust in these jobs; however, there is no evidence as to whether he did or did not wear a respirator during this time.

Around 1960, Porter began working at the cement pump house and, for about thirteen years, continued in this employment, that is, until 1973. Because of the high concentrations of

cement and silica dust, work at the cement pump house required the use of a respirator. Despite this requirement, Porter often failed to wear his respirator.[4] According to his own deposition, Porter wore his mask only when dust levels were high. This often occurred when the railroad gondolas were opened for pumping out silica or cement and when the pump malfunctioned or clogged in some manner. Most of the day he let the respirator hang around his neck.

Porter's job during this time also required him to enter the main plant several times every day to change tank valves on the second floor. It is not clear, however, that Porter ever worked in this area without his respirator.

Porter was first admitted to a Veterans Administration Hospital in 1970 for a hernia. This admission was not related to any lung or respiratory problems.[5] In June, 1971, Porter was hospitalized for twelve days for evaluation of shortness of breath. He was next admitted to the hospital in April, 1973, for approximately three weeks. The symptoms were soreness in the chest, coughing, deep breathing problems, an increase in breath

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[4] Testimony from various employees at National Gypsum asserted that Porter often did not wear his respirator. Supervisor Nolte Lincks stated that Porter wore the respirator less than one half the time in his working area at the cement pump house where it was required. He added, however, that Porter was not required to wear the mask at his station during all eight hours of his working day. Edward Benezech, assistant personnel and safety supervisor for several years at the plant, testified that he saw Porter not wearing his mask at various times when it should have been worn. Willie Field, a relief man at the plant, saw Porter not wearing his mask; however, this was only when Porter was going to and from work and at lunch, times when the mask was not required to be worn.

[5] Porter's wife testified at trial, however, that Porter first began experiencing breathing problems and coughing spells in 1969. During this time Porter took cold medicine and cough syrup to relieve his condition.

shortness, and pus. The diagnosis was superimposed pneumonia with some type of chronic obstructive lung disease. Asbestosis was not diagnosed.

Porter returned to the hospital in August, 1973. During this admission, the hospital diagnosed possible tuberculosis and instituted drug therapy for this condition. Porter's condition did not improve, however, and continued to progress. During 1973, Porter was reassigned at National Gypsum from his job at the cement pump house to work inside the main plant. His illness was a direct cause of this reassignment. In his new job inside the plant, Porter hauled wet byproduct from mixing machines for recycling purposes. The dust level was lower in this area and respirators were not required for Porter or the machine operators.

During 1974, Porter was admitted to the hospital two more times. In April, he was diagnosed as having a ruptured lung. This was treated and treatment also continued for tuberculosis and pneumonia. In September, Porter was again admitted for a possible ruptured lung. While this condition was not found, Porter was treated for a fractured rib. Late in 1974, Porter terminated his job with National Gypsum due to the disability caused by his lung condition.

Porter returned to the hospital in January, 1975. He had progressive lung lesions. Because Porter's case was considered puzzling, the hospital staff decided to perform a lung biopsy, which consisted of removing a very small piece of the lung for extensive testing. Testimony by the attendant doctor indicated a fear of an undiagnosed progressive fungus which a biopsy would finally confirm or rule out. *The biopsy revealed a strong case of asbestosis.* The report described Porter's condition as "fibrosis with fragments of asbestos bodies trapped in the fibrous connective tissue. Asbestos bodies or fragments of asbestos bodies are seen throughout all the sections." The report gave no indication that Porter had silica or cement dust in his lungs.

On May 22, 1977, Porter died from his chronic lung condition. The death certificate listed the immediate cause of death as respiratory failure due to chronic obstructive pulmonary disease. Listed as significant conditions contributing to the death were asbestosis, serratia pneumonia, and renal insufficiency. The attendant doctor testified that asbestosis was a significant and major condition leading to death.[6]

4. *Expert Testimony on Respirator and Filter Performance*

At the trial Dr. William George was called for the plaintiff as an expert toxicologist. He was not qualified by the Court as an expert in respirator or filter design. Dr. George testified that he had conducted a number of inhalation studies. None prior to his test of the apparatus provided by the plaintiff, however, had involved a respirator device.

Dr. George presented the results of an experiment conducted to determine the percentage of asbestos fibers that passed through a sample respirator and filter apparatus similar to that used at National Gypsum. The particular respirator tested and introduced into evidence at trial was labeled R-2000, a single muzzle respirator. The filter tested in the experiment and introduced into evidence at trial was classified as R-17. Both the respirator and filter were obtained by the plaintiff from the American Optical product library which kept samples of all products manufactured by the company. Although the

[6] The defendant introduced at trial evidence of other factors that could have contributed to Porter's death. Two of these factors were Porter's moderate to heavy smoking and drinking. Dr. Morton Brown testified for the plaintiff that smoking was a contributing factor to Porter's lung condition. He further stated that no evidence of lung cancer or any tubercularin germ was ever found in Porter. He indicated that any emphysema in Porter was related to asbestosis. Dr. Brown concluded, "The asbestos initiated a chain of events that culminated in his death."

samples used at trial were not the exact ones used by Porter during his employment, several National Gypsum employees testified that they were the type of respirator and filter apparatus used at the plant during Porter's employment.[7] Asbestos dust used in the test was taken from the plant environment.

The experiment consisted of an air bag, with an asbestos concentration equal to the environment at National Gypsum, connected to a breathing apparatus that pulled air through to simulate the air flow of a respirating person. The respirator device was attached firmly and taped tightly to a dummy figure of a head and face. An electric fan was used to blow the bag and cause asbestos fibers to fill the air in the bag. Placed in the back of the breathing apparatus was a nylon screen mechanism with small holes fifty microns in size (fifty micrometers by fifty micrometers). This nylon screen would trap all asbestos particles fifty microns and larger in size that passed through the respirator and filter. Based upon comparative air environment studies tabulated before and after the air passed through the filter, Dr. George's results revealed that 9.4-9.5% of the asbestos particles passed through the filter. He explained that this figure was "conservative" since he estimated that as many as 50% of the asbestos particles were less than 50 microns in size and passed unhampered through the nylon screen and out of the system. His more liberal estimate of asbestos particles passing through the filter ranged from 18-20%. During a cross-examination that attacked the design of his experiment and its dissimilarity from normal working conditions at National Gypsum, Dr. George defended the validity of his test procedures.

[7] The plaintiff introduced two respirator apparatus into evidence during the trial as plaintiff's exhibits six and seven. The exhibit six mask contained an R-17 filter. The exhibit seven mask contained a different R-25 filter. The R-17 apparatus was the exhibit continually used by the plaintiff at trial and identified by employees at National Gypsum as the type used by them.

The defendants presented Dr. Bruce Held as an expert in industrial hygiene, filter testing, the establishment of respirator programs for industrial use, and quality control programs for manufacturers in the respirator industry. However, Dr. Held was not qualified as an expert in respirator design.

Dr. Held testified about government safety standards and testing in the field of respirators. His comments noted that the Bureau of Mines of the Department of Interior generally tested two types of dust, silica and lead dust, out of thousands of dust types found in the environment. These two types were representative since they were different in shape and texture and generally were harder to filter out than rod-shaped asbestos particles. He stated that filters had to have a 98% or greater efficiency rate to be approved by the government. All the filters in use at National Gypsum, including the R-17 filters, had approval from the Bureau of Mines. *The testing by the Bureau of Mines, however, did not involve asbestos dust.* Dr. Held added that National Gypsum maintained a poor respirator-safety program and failed to follow established standards.[8]

Dr. Held also attacked the validity of the experiment conducted by Dr. George. Inaccuracies pointed out included the use of an old respirator and filter that *may have* deteriorated in condition over time, therefore permitting leakage of asbestos particles, and the use of the fan, which *may have* forced particles through the filter, thereby failing to duplicate actual conditions. Dr. Held also criticized the dust concentration and a failure to simulate the proper inhale-exhale method of breathing. On cross-examination, however, Dr. Held stated that he had no personal knowledge whether the R-17 filter used

[8] Dr. Held noted that National Gypsum's respirator program did not include proper atmosphere testing to determine the type of respirator needed, proper cleaning and maintenance, proper storage in a clean atmosphere, and daily inspection and maintenance for defects and fitting.

in the experiment was, in fact, in a deteriorated state due to its age. He also admitted that he had never compared the passing of asbestos particles with silica particles.

Both the plaintiff and the defendants presented additional expert witnesses to support the viewpoint of their main experts. The plaintiff had Benjamin Lehman, an expert mechanical engineer with experience in testing large, commercial filter systems, who testified that Dr. George's experiment was valid. Lehman commented that filter efficiency for asbestos dust could not be tested properly by using silica dust due to the difference in the shape and structure of the particles. In addition, he knew of no evidence where either the Bureau of Mines or American Optical had tested filters using asbestos dust. He noted that information was availabe to regulatory agencies to indicate a need for better testing of various dusts. Lehman concluded by noting that the R-17 filter tested for trial did not appear to have significant wear and the respirator valves looked like ones found in a new device.

Dr. Peter Magnante, an expert in filter testing and design and a mechanical engineer, testified for the defendants that it was not necessary to test the R-17 filter with asbestos to establish a proper efficiency level. In his opinion, silica was a "worse case test" for filter testing. He also noted that six to eight different types of filters could be used in an R-2000 respirator. His testimony revealed that National Gypsum purchased R-17, R-25, and R-90 filters for use in the respirator. He added, however, that the R-17 filter had a different configuration and was designed for catching smaller particles than the R-25 filter. Dr. Magnante could not find any defects in the R-17 filter upon cursory examination and had not tested this type filter with asbestos dust.

Other testimony presented centered on the warnings given by American Optical and National Gypsum concerning the wearing and fitting of the respirator appratus and the periodical changing of filters. Evidence showed that each respirator

appratus came in a box with an enclosed sheet of instructions for use and maintenance. National Gypsum also produced evidence of a respirator safety program used by their plant.[9]

At the close of the plaintiff's case American Optical moved for a directed verdict based on the lack of any evidence showing its product was unreasonably dangerous and not fit for normal use. The Court denied this motion. At the close of all the evidence American Optical renewed its motion which was again denied. The liability issue was submitted to the jury with a special verdict form to indicate whether the defendant American Optical was liable for either a defective design that was unreasonably dangerous or negligence in failing to warn of inherent danger in the respirator product.[10]

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[9] The evidence relating to warnings and various safety programs was introduced at trial to establish whether American Optical was negligent in failing to warn of dangers inherent in the use of its respirator product. Since this issue was resolved by the jury in favor of American Optical, it is not at issue on appeal and these programs need not be discussed in detail.

[10] The special verdict given to the jury propounded six questions:

1. Was the respirator apparatus manufactured by Defendant, American Optical Corporation, defective in its design so as to be unreasonably dangerous and not fit for normal use?

Yes____ No____

2. Was such a defect a proximate cause of injury to Mr. Porter?

Yes____ No____

3. Was defendant, American Optical Corporation, negligent in failing to warn Mr. Porter of dangers inherent in the use of the respirator apparatus?

Yes____ No____

4. Was such negligence a proximate cause of injury to Mr. Porter?

Yes____ No____

5. Did Mr. Porter voluntarily assume the risk which caused his illness?

Yes____ No____

6. What amount of money, expressed in dollars, will fairly and adequately compensate Plaintiffs for their injuries? $_____

The jury found that the respirator apparatus was defective in design so as to be unreasonably dangerous and not fit for normal use and that it was a proximate cause of Porter's injury. The jury found American Optical not to have been negligent in failing to warn of dangers inherent in the use of the respirator apparatus. It further found that Porter did not voluntarily assume the risk which caused his illness. The plaintiff was awarded $155,000 in monetary damages.[11] Following this verdict the Court denied American Optical's motion for a judgment notwithstanding the verdict or, alternatively, for a new trial.

[1] In a diversity case in this Circuit, federal courts apply a federal rather than a state standard for determining whether evidence in a trial is sufficient to create a jury question and to defeat a motion for a directed verdict or judgment n. o. v. *Boeing Co. v. Shipman*, 411 F.2d 365 (5th Cir. 1969) (en banc). The standard is:

> On motions for directed verdict and for judgment notwithstanding the verdict the Court should consider all of the evidence—not just that evidence which supports the non-mover's case—but in the light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the motions is proper. On the other hand, if there is substantial evidence opposed to the

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[11] During trial the plaintiff offered an economist who established that lost earnings and support occurring prior to Porter's death totaled $26,600. Loss of future earning capacity based upon life expectancy totaled $28,000, for a sum total of $54,600 for loss of wages and support. This amount did not take into consideration possible damages to be awarded for funeral expenses, family loss of "society", physical pain and suffering and mental anguish by Porter prior to death, incurred medical expenses, loss of household services performed by Porter, and mental anguish suffered by the surviving family due to Porter's death.

> motion, that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motions should be denied, and the case submitted to the jury. A mere scintilla of evidence is insufficient to present a question to the jury.... There must be a conflict in substantial evidence to create a jury question. However, it is the function of the jury as the traditional finder of the facts, and not the Court, to weigh conflicting evidence and inferences, and determine the credibility of witnesses (footnote omitted).

Id. at 374-75. See *McCormack v. Noble Drilling Corp.*, 608 F.2d 169 (5th Cir. 1979); *Stockstill v. Gypsum Transportation*, 607 F.2d 1112 (5th Cir. 1979); *King v. Ford Motor Co.*, 597 F.2d 436 (5th Cir. 1979).[12]

Following the test outlined in *Boeing*, the function of an appellate court is "to ascertain whether there is a rational basis in the record for the jury's verdict; we are forbidden to usurp the function of the jury by weighing the conflicting evidence and inferences and then reaching our own conclusion." *Bauman v. Centex Corp.*, 611 F.2d 1115 (5th Cir. 1980), quoting *Reyes v. Wyeth Laboratories*, 498 F.2d 1264, 1288 (5th Cir. 1974). We therefore turn to an examination of the evidence presented at trial to see whether reasonable men in the exercise of impartial judgment could reach different conclusions based upon the controlling products liability jurisprudence of Louisiana.[13]

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[12] In *Campbell v. Mouton*, 373 So.2d 237 (La.App.1979), the Louisiana Court of Appeals adopted the *Boeing* standard for state practice.

[13] While a federal standard is employed for determining sufficiency of the evidence, state law controls the substantive issue of whether the evidence proved a defective design in a product liability action. *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938).

[2, 3] Under Louisiana law, a manufacturer of a product which involves a risk of injury to the user is liable to any person, whether a purchaser or a third person who without fault on his part is injured by a defect in the design, composition, or manufacture of the article, if the injury might reasonably have been anticipated. In such a case, the plaintiff has the burden of proving that the product was defective, i.e., unreasonably dangerous to normal use and that plaintiff's injuries were caused by reason of the defect. *Weber v. Fidelity & Casualty Ins. Co. of New York*, 259 La. 599, 250 So.2d 754 (La.1971).

In *Leathem v. Moore*, 265 So.2d 270 (La.App.1972), the Louisiana Court of Appeals commented on this general rule outlined in *Weber* by adding:

> The foregoing rule requires the manufacturer to exercise reasonable care in the design of its products which are of such nature that, if not carefully made, can cause foreseeable injury to persons using the products for purposes which the manufacturer may reasonably expect they will be employed, and also to those whom the manufacturer may reasonably expect to be endangered by such probable use. Failure to exercise such care renders the manufacturer liable if injury results from lawful use of the product in a manner and for a purpose which the manufacturer may be deemed to reasonably expect. However, such liability does not extend to the whole world, nor does it involve all risks that might result in injury.

Id. 265 So.2d at 276. *See Fox v. American Steel Building Co., Inc.*, 299 So.2d 364 (La.App.1974).

[4-6] A product is defective and unreasonably dangerous when a reasonable seller would not sell the product if he knew of the risks involved or if the risks are greater than a reasonable buyer would expect. *Hagans v. Oliver Machinery Co.*, 576 F.2d 97 (5th Cir. 1978); *Welch v. Outboard Marine Corp.*, 481 F.2d 252 (5th Cir. 1973) (applying Louisiana law); *Daniels v. Albach Co., Inc.*, 365 So.2d 898 (La.App.1978). If a product is proven defective by reason of its hazard to normal use, a

plaintiff need not prove any particular negligence by the maker in its manufacture or processing. The manufacturer is presumed to know of the defects in the thing he makes, whether or not he has actual knowledge of them. *Weber, supra; Reeves v. Great Atlantic & Pacific Tea Co.*, 370 So.2d 202 (La.App.1979). *See Chappuis v. Sears Roebuck & Co.*, 358 So.2d 926 (La.1978) (plaintiff need not prove defective design or manufacture if he proves he was injured by a product "unreasonably dangerous to normal use").

[7] In the present case, as hereinabove recited, there is a clear conflict in the evidence as to whether the American Optical respirator apparatus was defective in design and unreasonably dangerous for normal use.

[8] We have considered American Optical's attacks on the testimony of Dr. George regarding the test procedure he employed to show a 9-20% passage of asbestos particles through the R-17 filter. American Optical points out that Dr. George was qualified as an expert toxicologist and not as an expert in the design and manufacturing of respirators or filters. Furthermore, the test was on only the R-17 filter and not on other various filters used by the National Gypsum plant. This filter was not in "new" condition but was a library sample quite a few years old. American Optical further contends that his testing procedure was conducted without consulting accepted industry standards for proper test procedures for respirators and filters and prior test data reports from industry manufacturers and regulatory agencies. American Optical strongly urges that Dr. George's testimony was entitled to no weight whatsoever and should have been excluded. However, that Dr. George was qualified as an expert toxicologist and not as a design expert was made absolutely clear to the jury. Therefore, American Optical's objections went to the weight of his testimony rather than to its admissibility. *Stempel v. Chrysler Corp.*, 495 F.2d 1247 (5th Cir. 1974) (per curiam). *See Eastern Air Lines, Inc. v. American Cynamid Co.*, 321 F.2d 683 (5th Cir.

1963). Furthermore, Dr. George's test results were challenged by American Optical's witnesses. The weight, the accuracy, and the validity or invalidity of Dr. George's tests were submitted to the jury and that is all that was necessary.

American Optical argues that the jury's verdict was based on the absence of any evidence that the design of the respirator and filter did not measure up to the "state of the art" of the manufacturing process and the accepted standards in the industry. In particular, American Optical relies on the reasoning employed in *Ward v. Hobart Manufacturing Co.*, 450 F.2d 1176 (5th Cir. 1971), *Weakley v. Fischbach & Moore, Inc.*, 515 F.2d 1260 (5th Cir. 1975), and *Dean v. General Motors Corp.*, 301 F.Supp. 187 (E.D.La.1969).

Ward was a diversity case from Mississippi involving the negligent design of a meat grinder. In that case this Court stated that it was necessary to measure the reasonableness of a product's design against objective standards.[14] The Court then held that the design of the meat grinder exceeded the standards of the meat grinder industry in 1948 and that it was reasonably safe. However, the Court added

> Without placing the question of Hobart's negligence in its proper setting the district court concluded that the standards of an industry are not controlling, and hence that the entire meat grinder industry was lacking in ordinary care in 1948. Where there is strong evidence to counter the customary practices of an industry at time of manufacture we would agree, but in the present case no evidence and

[14] The objective criteria listed by the Court were: (1) conformity of defendant's design to the practice of other manufacturers in its industry at the time of manufacture, (2) the open and obvious nature of the alleged danger, and (3) the extent of a claimant's use of the very product alleged to have caused the injury and the period of time involved in such use by the claimant and others prior to the injury without any harmful incident. 450 F. 2d at 1182. The Court also noted that none of these factors alone was controlling.

> little case law was presented which would indicate that the standards to which Hobart adhered in 1948 were unreasonable.

450 F.2d at 1185.

We conclude that in total context *Ward*, besides being a Mississippi case instead of a Louisiana case, does not support the result sought by American Optical.

Weakley was a diversity suit from Texas involving as one issue the negligent design of an electrical isolator switch which exploded and seriously burned four electricians. The defendant in that action impleaded the parent company that designed the equipment and attempted to show that design alternatives could have been adopted which would have minimized or prevented accidents with the electrical equipment. In holding that the manufacturer and designer of the electrical equipment should have been granted a directed verdict, the Court stated:

> It is one thing to show that the defendant might have designed a safer product; quite another to show that the product he did design was unreasonably dangerous. The defendant is not obligated to design the safest possible product, or one as safe as others make or a safer product than the one he has designed, so long as the design he has adopted is reasonably safe. (Citations omitted.)

515 F.2d at 1267. The Court did note that the defendant presented no evidence that the design of the equipment deviated from accepted industrial practice and, more importantly, said that no expert testimony had been presented to support the allegation that the design was unreasonably dangerous.

In *Dean* a District Court in Louisiana held that a Chevrolet ignition lock system was not defective in design. The Court noted that there was no defect in design if reasonable care had been taken in adopting it, even though the design was not perfect. Reasonable care depended upon facts known at the time the design was adopted. The Court added, however, that

compliance with customs was not of itself sufficient to constitute due care. See *Muncie Aviation Corporation* v. *Party Doll Fleet, Inc.*, 519 F.2d 1178 (5th Cir. 1975) (compliance or noncompliance with industry, group or organization custom is one factor the trier of fact may consider in applying a standard of care but it is not conclusive.)

American Optical contends that it designed and manufactured the respirator apparatus with reasonable care and that this is supported by industrial standards at the time of the design. It points out that the filter passed all tests for various dusts conducted by the Bureau of Mines and met all standards outlined by industry publications. Since it was in compliance with the "state of the art" and governmental standards, therefore, American Optical asserts that it could not have been negligent in designing a respirator and filter unreasonably dangerous to normal use.

In *Simien v. S. S. Kresge Co.*, 566 F. 2d 551 (5th Cir. 1978), this Court commented that testimony that a product far exceeded federal requirements was *substantial evidence* that the product was not unreasonably dangerous. This is bound to be true as an evidentiary proposition, but the Court also recognized that the other courts had held compliance with the standard as not conclusive of a measure of defectiveness or unreasonable danger. *See Raymond v. Riegel Textile Corporation*, 484 F. 2d 1025 (1st Cir. 1973); *La Gorga* v. *Kroger Company*, 275 F. Supp. 373 (W. D. Pa. 1967). But in *Simien* the Court added:

> *If the plaintiff produces substantial expert or lay evidence that a* [product] *which complies with the federal standard is nevertheless unreasonably dangerous for normal use, the plaintiff is entitled to a jury determination.* (Emphasis added.) 566 F. 2d at 558.

The Court recently re-examined this standard in *Quinn* v. *Southwest Wood Products, Inc.*, 597 F. 2d 1018 (5th Cir. 1979). In *Quinn* a jury found a wooden ladder complying with or

exceeding in design all relevant OSHA and industry standards to be nevertheless unreasonably dangerous and defective in design. Following *Simien*, the Court reversed and held that there was no substantial evidence to find the ladder unreasonably dangerous. In doing so, the Court noted that the evidence supporting the reasonable design of the ladder was *overwhelming, undisputed, undisputed*, and *unimpeached*. It included industry and government design standards met by generous margins of safety and physical evidence. The evidence supporting faulty design was termed "sketchy and meager". No tests were introduced to dispute the evidence supporting reasonable design. 597 F. 2d at 1024.

[9] Louisiana courts have stated that the custom of the industry may be considered when determining the duty owed by a product manufacturer. This custom, however, is not conclusive. *Leonard* v. *Albany Machine and Supply Co.*, 339 So. 2d 458 (La. App. 1976). In *Leathem* v. *Moore*, 265 So. 2d 270 (La. App. 1972), the Louisiana Court of Appeals commented:

> By its very nature, the criteria of reasonable care, applicable in instances of this nature, must be flexible inasmuch as it depends on the peculiar facts and circumstances of each individual case. Even though a design may not be perfect or foolproof, it is still not defective provided reasonable care is taken in its adoption. On the other hand, neither custom nor usage in manufacturing style, nor prolonged marketing and use without significant injury producing accidents, can exonerate the manufacturer from liability for reasonably foreseeable injury resulting from use. These latter factors are merely part of the attending circumstances which must be weighed and considered in each case of this nature.

Id. at 276.

In this case it is undisputed that Porter had asbestos fibers in his lungs, that asbestosis was a cause of death, and he could not have inhaled the asbestos fibers anywhere but in National Gypsum's plant. He had worked there for twenty one years

before the asbestosis symptoms first appeared. That being so, the issue of liability on the part of the filter supplier turns on two points: whether there was evidence that Porter used the filters in question, and whether they were defective for their intended use. There was evidence that Porter did use the filters during the period in question and we have detailed the evidence as to the filter defect.

Unlike the situations present in *Quinn, supra*, and *Weakley, supra*, the Porter jury had the testimony of two experts, and the specific findings from tests, to support the view that the R-17 filter was defective in letting through a dangerous number of asbestos particles. Disastrously for American Optical, we think, the evidence revealed that even though American Optical followed and relied upon testing standards formulated by the Bureau of Mines, those test procedures *did not involve asbestos particles* but only lead and silica particles. Testimony from one of plaintiff's witnesses asserted that the government and industrial testing standards were themselves inadequate and it cannot be disputed that there was information available to indicate the need for better test procedures for asbestos filters.[15] Keeping in

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[15] On cross-examination, Benjamin Lehman testified:

> Q. Now, is it not a fact that the Bureau of Mines for many years made no distinction between a respirator device and the filters that were categorized as dust respirators and the ability of those devices to hold out, block asbestos, silica or similar dust particles?
>
> A. So far as I know that is a true statement. But as you know, these regulatory agencies are very slow to move. *There was a great deal of information known in the industry which indicated they should have done something.*

Lehman also testified that a safer respirator could have been designed.

> Q. You can answer that question.
>
> A. It is certainly possible to design one that would be more than ninety-nine and three quarters percent effective. In other

(Footnote continued on following page.)

mind the *Ward* and *Dean* decisions relied upon by American Optical, a jury could have concluded that the customary practices and standards of the entire respirator and filter industry were defective for failure to test with asbestos particles.[16] Considering the risks involved in using the American Optical respirator apparatus and based upon the conflicting testimony, a reasonable jury could have concluded, as this jury did, that the product was "unreasonably dangerous" as characterized under Louisiana law. *See Welch v. Outboard Marine Corp.*, 481 F.2d 252 (5th Cir. 1973) (applying Louisiana law); *Daniels v. Albach Co., Inc.*, 365 So.2d 898 (La.App. 1978).[17]

(Footnote continued from preceding page.)

> words, less than one-quarter of one percent would get through. Approximately one-eighth of one percent or even less than that. Absolute effectiveness, of course, is like all—like the status of purity, nothing is one hundred percent zero zero zero pure.

Of course, the fact that a safer product could have been designed is not conclusive that the design was unreasonably dangerous. *Weakley v. Fischbach & Moore, Inc.*, 515 F.2d 1260 (5th Cir. 1975).

[16] In 1972, the National Institute for Occupational Safety and Health (NIOSH) replaced the Bureau of Mines as the federal agency issuing government approval for respirator and filter products. The 1972 NIOSH guidelines were more strict and made the American Optical products obsolete under the new standards. Manufacturers were given a grace period to convert production to newer standards prior to a total ban on the older products. While reasonableness of conduct must be judged in light of circumstances at the time of manufacture, *Ward v. Hobart Manufacturing Co.*, 450 F.2d 1176, 1182 n.16 (5th Cir. 1971) and cited cases, American Optical was on notice of possible defects in the respirator product from 1972 until the time Porter discontinued his employment due to the new NIOSH regulations.

[17] American Optical has asserted in its brief that the issues in the present case are parallel to those in the *Ward* decision and that a close examination of the *Ward* reasoning will prove that the jury's verdict was clearly erroneous for failing to measure the reasonableness of a product's design against objective standards. We do not feel strictly

(Footnote continued on following page.)

[10] We believe that there was substantial evidence from which a jury could conclude that a defective design in the respirator apparatus proximately caused Porter's injury. The plaintiff's burden is to prove causation by a preponderance of the evidence, which may be met by direct or circumstantial evidence. The evidence need not negate all other possible causes. *Weber, supra,* 259 La. 599, 250 So. 2d at 757. See *Jordan* v. *Travelers Insurance Co.,* 257 La. 995, 245 So. 2d 151 (La. 1971); *Reeves* v. *Great Atlantic & Pacific Tea Co.,* 370 So. 2d 202 (La. App. 1979).

Even though there was testimony that Porter did not wear his respirator during 50% of the time of a work day, this evidence related mainly to Porter's work at the cement pump

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(Footnote continued from preceding page.)

bound by the reasoning set out in *Ward* since in that case the Court was applying Mississippi law and found little state law in the area of negligent design of products. The differing facts and evidence also necessitate distinguishment. We are obligated to view a jury's perception of reasonable design under Louisiana law. Most of the pertinent Louisiana cases speaking to products liability law have been decided since the *Ward* decision.

When examining the objective standards followed in *Ward,* we observe that the Court did not consider any one factor controlling. As already noted, Louisiana considers industry custom as one factor to be considered in determining reasonable design of products. However, this is not by itself conclusive.

Concerning its second objective factor, *Ward* stated that the open and obvious nature of an alleged danger generally favored no negligence in design. 450 F.2d at 1182, n.17. In the present case the danger in the design of the filter is anything but open and obvious to the consumer user, thereby making it latently dangerous and weighing against reasonable design under the *Ward* analysis.

The third objective factor discussed in *Ward* recognized that the long period of time a product had been on the market without accident favored a reasonable design. The Louisiana Court of Appeals has addressed this issue in *Leathem v. Moore,* 265 So.2d 270 (La. App.1972), noting this factor cannot exonerate a manufacturer from liability if injury is still reasonably foreseeable.

house which involved exposure to high levels of cement and silica dust, not *asbestos dust*. Other evidence indicated that Porter did wear his respirator inside the main plant where asbestos dust was more prevalent. The experiment conducted by Dr. George revealed that a dangerous level of asbestos particles did penetrate an R-17 filter. The expert mechanical engineer, Benjamin Lehman, testified that Dr. George's experiment was valid. The ultimate fact is that Porter did contract a strong case of asbestosis and it killed him after long periods of painful disability. It is not denied that this condition directly led to Porter's illness and death. Appraising the evidence as a whole, a jury could reasonably have concluded that defective design of the respirator, which failed to inhibit inhalation of the asbestos particles, was a proximate cause of Porter's injury and death.

The federal standard enunciated in *Boeing, supra,* was met. Under Louisiana products liability law the evidence was such that reasonable and fair-minded jurors in the exercise of impartial judgment might reach different conclusions on whether the American Optical respirator apparatus was defective in design and thereby a proximate cause of Porter's illness and death. Consequently, we have no warrant for appellate interference with the verdict and hold that the motions for a directed verdict of judgment n. o. v. were correctly denied by the District Court. The judgment against American Optical on the issue of liability is affirmed.

III. *Insurance Coverage, or No Coverage*

The second issue, the one raised by the respective insurance carriers, is whether the trial court properly held Hartford solely liable for insurance coverage against the loss sustained by American Optical. The real question is whether insurance liability for injury from a cumulative, progressive disease, such as asbestosis, should be apportioned among various insurers on

a pro rata basis according to an "injurious exposure" approach or, instead, should be applied to only one of the insurers under a "first manifestation" theory. We have concluded that as to the case presently before us and now being decided "injurious exposure" is the correct test.

From 1954 to January 1, 1971, Aetna provided coverage. Aetna produces the insurance policies covering the period 1967 to 1971. While neither Aetna nor the insured were able to locate any earlier policies, Aetna conceded that it insured American Optical from 1954 to January 1, 1971. Aetna's coverage period spanned the first years of Porter's exposure to asbestos particles but ended prior to his hospitalization and an outward manifestation of asbestosis.

From January 1, 1971 to January 1, 1975, Hartford provided coverage in two separate policies. The first Hartford policy (Hartford # 1) was in effect from January 1, 1971 to January 1, 1974. The second Hartford policy (Hartford #2) was in effect from January 1, 1974 to January 1, 1975. The named insured on both of these policies was the Warner-Lambert Company. Hartford agreed, however, that American Optical, as a corporate affiliate of the named insured, was insured for the enumerated years. Hartford's policy period covered several years of Porter's exposure to asbestos particles and the years during Porter's hospitalization, outward manifestation of asbestosis symptoms, and onset of permanent disability.

From January 1, 1975 to January 1, 1978, Continental provided coverage. During this policy period Porter remained permanently disabled, asbestosis was formally diagnosed as his disease, and Porter died. It must be emphasized, however, that no exposure to asbestos dust, or use of the American Optical respirator apparatus, occurred during the period of Continental's coverage.

All the policies insuring American Optical are of a type generally referred to as "occurrence" policies. Each of the policies provides that the company will pay on behalf of the insured all sums which the insured becomes obligated to pay as damages because of *bodily injury* caused by an *occurrence*.

The *Aetna* policy defines "occurrence" and "bodily injury" as follows:

> "Occurrence" means an event which unexpectedly caused injury *during the policy period* or a continuous or repeated exposure to conditions which unexpectedly caused injury to person or tangible property *during the policy period*. All such exposure to substantially the same general conditions shall be deemed one occurrence. (Emphasis added.)
>
> * * * * * *
>
> "Bodily injury" means bodily injury, sickness or disease sustained by any person; . . .

The *Hartford #1* policy provides the following definitions for these terms:

> "Occurrence" means an accident, including injurious exposure to conditions, which results, *during the policy period*, in bodily injury or property damage neither expected nor intended from the standpoint of the insured; (emphasis added) . . .
>
> * * * * * *
>
> "Bodily injury" means bodily injury, sickness or disease sustained by any person; . . .

The *Hartford #2* policy provides these slightly altered definitions:

> "Occurrence" means an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured;

* * * * * *

"Bodily injury" means bodily injury, sickness or disease sustained by any person *which occurs during the policy period,* including death at any time resulting therefrom; (emphasis added).

The *Continental* policy defines these terms as follows:

"Occurrence" means an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured;

* * * * * *

"Bodily injury" means bodily injury, sickness or disease sustained by any person *which occurs during the policy period,* including death at any time resulting therefrom; (emphasis added).

Following the jury verdict of liability and damages owed by American Optical, the parties, as reserved by stipulation, submitted the issue of insurance coverage to the District Court. After an examination of the terms of each of the pertinent policies, the Court held that the Hartford #1 and #2 policies provided the coverage applicable to the loss sustained by American Optical.[10] The Court reasoned the Aetna policy did

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[10] In a post trial memorandum, Hartford argued that the Hartford #1 policy did not provide coverage because of an exclusion clause. Exclusion K in the policy provided in part that the insurance would not apply to bodily injury resulting from the failure of the insured's products to perfom the function or serve the purpose intended by the insured if the failure was due to a mistake or deficiency in any *design,* formula, plan, specifications, advertising material or printed instructions prepared or developed by the insured. This exclusion did not apply to bodily injury resulting from the active malfunctioning of such products.

The District Court found it unnecessary to determine whether Exclusion K could defeat coverage by Hartford #1 since it found coverage was clearly provided by Hartford #2 due to Porter's exposure to asbestos dust and illness during this policy period. The Court noted that factual questions surrounding applicability of the exclusion were not tried.

not provide coverage because exposure to the asbestos during its coverage did not provide coverage because exposure to the asbestos during its coverage did not result in a *manifestation* of injury, sickness or disease and, therefore, there was no occurrence of bodily injury. Continental was absolved of liability because both exposure and manifestation of the illness occurred prior to its coverage.

The insurance was written for the protection of the filter manufacturers—not for the asbestos manufacturer. The respirators, however, were intended to defeat the health hazards involved in employment in the asbestos plant. Consequently, we see no reason for treating this case any differently than that of an asbestos manufacturer, i.e., the controlling principles should be the same.

During most of the period in question, American Optical had three insurers. Aetna had the coverage during most of the period when the asbestos particles accumulated in Porter's lungs but before the disease manifested itself. Hartford had the coverage when the illness became manifest. Continental come in after Porter had taken disability retirement but before his death. Nothing done or omitted by American Optical *after* Porter quit work could have contributed to or been a proximate cause of his illness or death.

There was medical evidence that each introduction of fibers into Porter's lungs was "bodily injury", cumulatively and progressively more harmful to the victim.

Hartford argues for the application of a proration theory of insurance coverage that will spread liability and cost proportionately among all insurers that insured American Optical during the time Porter was exposed to asbestos particles and injured. It is supported in its cause by several amici curiae.[19]

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[19] The amici curiae supporting either a proration theory or an exposure theory include the Keene Corporation and certain underwriters at Lloyds, London and Turegum Insurance Company, Andrew Weir Insurance Company and River Thames Insurance Company.

The dismissed defendant insurance companies, Aetna and Continental, support a *manifestation* theory of coverage which would place entire liability and cost on the insurer covering American Optical at the time the asbestos-related disease first surfaced and made itself known through demonstrable symptoms. They also are supported by numerous amici curiae.[20]

[11-13] The District Court commented that Louisiana law controlled the diversity action and cited *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938). Louisiana law did control the issues of negligence and products liability, but it does not automatically follow that Louisiana law controls interpretation of the insurance contracts here in question. In a diversity case a federal court is to follow the choice-of-law rules of the jurisdiction in which it sits. *Klaxon v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 61 S.Ct. 1020, 85 L.Ed. 1477 (1941). Louisiana follows the general rule that the nature, validity and construction of a contract is to be determined by the law of the place where it was made. *United States Leasing Corporation v. Keiler*, 290 So.2d 427 (LA.App.1974); *Bologna Bros. v. Morrissey*, 154 So.2d 455 (La.App. 1963). Absent contrary intent by the parties, a contract is considered executed at the place where the offer is accepted or where the last act necessary to a meeting of the minds or to completing the contract is performed. *Williams v. Travelers Ins. Co. of Hartford, Conn.*, 19 So.2d 586 (La.App. 1944). Insurance policies are to be construed and interpreted the same as other contracts and written agreements. *Martin v. Phillips*, 356 So.2d 1016 (La.App.1977); *Savoie v. Fireman's Fund Ins. Co.*, 339 So.2d 914 (La.App.1976), *aff'd*, 347 So.2d 188 (La.1977); *Dean v. Union Nat. Fire Ins. Co.*, 301 So.2d 925

[20] The amici curia supporting a manifestation theory include the Insurance Company of North Ameriea, Federal Insurance Company, Fireman's Fund Insurance Company, Liberty Mutual Insurance Company, Eagle-Picker Industries, Inc., and certain underwriters at Lloyds, London and Walbrook Insurance Company along with other included British companies.

(La.App.1974). We assume, in the absence of a showing to the contrary, that these insurance contracts were made in Louisiana or in a state where the law would be the same as that of Louisiana.

[14] The policy language used by all three insurers in their policies is similar in context and provides the same extent of coverage. Each policy provides that the insurer will pay to the insured all sums which the insured is obligated to pay as damages because of *bodily injury* caused by an *occurrence*. "Bodily injury" is defined in each policy to include "bodily injury, sickness or disease." "Occurrence" is defined in each policy to mean an accident or event or a continuous or repeated exposure to conditions which causes or results in bodily injury. The only distinguishable variation found among the policies' use of these terms is the placement of the phrase "during the policy period." In the Aetna and Hartford # 1 policies this phrase is placed in the definition of "occurrence." In the Hartford # 2 and Continental policies this phrase is placed in the definition of "bodily injury."

In analyzing the provisions of the policies involved, the District Court stated:

> In the instant case each of the three defendant insurers has a policy limiting coverage to "occurrences" taking place during the policy period.

The Court further equated "bodily injury" with "sickness or disease". Based upon this rationale, the Court held that Aetna was not liable because Porter did not sustain bodily injury as the result of an occurrence during Aetna's policy period since the sickness or disease did not manifest itself during Aetna's policy. The Court also held that Continental was not liable because the "occurrence", i. e., exposure to asbestos dust, occurred prior to its policy coverage. Hartford was held liable because exposure occurred and bodily injury manifested itself during its policy period.

Since the District Court decided this case the Sixth Circuit has decided *Insurance Company of North America v. Forty-Eight Insulations, Inc.*, 633 F.2d 1212 (1980). That Court rejected the "manifestation" theory of insurance coverage in asbestosis cases and accepted the "injurious exposure" theory. It held that the insurance coverage (liability) should be prorated among all the carriers as to liability for cumulative, progressive lung disease as a result of exposure to asbestos products, except that an insurer would not be liable for any period where there was no exposure to asbestos manufactured by the insured.

We might prolong this already lengthy opinion by paraphrasing or rephrasing the Sixth Circuit opinion. We are content to say that we agree with its reasoning and result. Under the terms of the policies presently before us we reject the "manifestation" theory. We accept the "injurious exposure" theory and the logically consequent rule of proration of liability for insurance carriers who were on the coverage while the injured party was exposed to the asbestos hazards which resulted in illness and death.

We, therefore, hold that the judgment of the District Court assessing coverage solely to Hartford must be reversed and the cause remanded for proration of coverage (liability) between Aetna and Hartford in keeping with the teachings of the Sixth Circuit opinion. We realize that proration of the exact amount of liability to be assessed to Aetna and Hartford may be complicated by other aspects of the insurance policies which are not presently in issue. We simply observe that elapsed time of insurance company coverage for the total time involved (1954-1974) should be the basic fundamental of the required apportionment.

CONCLUSION

The judgment of the District Court against American Optical is affirmed.

The judgment of the District Court absolving Continental of liability on its insurance is affirmed.

The case is remanded for an apportionment of liability as between Aetna and Hartford.

AFFIRMED in part, REVERSED in part, and REMANDED.

APPENDIX "C"

CHARLES J. PORTER v. AMERICAN OPTICAL CORPORATION
CIVIL ACTION NO. 75-2202
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION
Slip Opinion
November 25, 1977; as amended March 28, 1978

OPINION BY: SCHWARTZ
OPINION:
SCHWARTZ, J.

Plaintiff in this diversity action sought damages for the illness and subsequent death of Charles Porter as the result of asbestosis allegedly contracted while Mr. Porter was an employee of National Gypsum Company in New Orleans. Defendants named were American Optical Corporation, manufacturer of a respirator and filter apparatus provided to Mr. Porter for use on his job, and its insurers during the period of Mr. Porter's employment and illness, Aetna Casualty and Surety Company, Hartford Accident and Indemnity Company, and Continental Insurance Company. Plaintiff's claims that the respirator apparatus was defective and that American Optical negligently failed to warn of its dangers were tried to a jury and resulted in a finding by the jury that the respirator apparatus was defective and that there was no negligent failure to warn. Damages were awarded in the amount of $155,000.00. The issues as to coverage supplied by the various insurers was reserved by stipulation of the parties for decision by the Court.

After careful consideration of the factual evidence adduced at trial, the memoranda of counsel, the insurance policies introduced into evidence, and the law, it is the opinion of the

Court, for the reasons hereinafter set out, that defendant Hartford Accident and Indemnity Company provided coverage applicable to the loss sustained herein. Accordingly, judgment in this matter should issue in favor of plaintiff and against American Optical Corporation and Hartford Accident & Indemnity Company in the amount of the jury verdict, dismissing plaintiff's claims as against Aetna Casualty & Surety Company and Continental Insurance Company.

According to the evidence, Mr. Porter was employed by National Gypsum from 1950 until his retirement as the result of illness and disability in April, 1974. Mr. Porter's first hospital admission referable to shortness of breath occurred in June, 1971. Thereafter he was hospitalized or seen by physicians repeatedly due to respiratory problems. During the period from 1971-1975 Mr. Porter's respiratory difficulties were diagnosed as being of various etiologies. In February, 1975 a lung biopsy was performed which diagnosed the patient's "chronic lung disease" as asbestosis. Mr. Porter died in May, 1977 as the result of chronic obstructive pulmonary disease.

The Applicable Law:

Louisiana law controls this diversity action. *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 817, 58 S. Ct. 817 (1938). The Louisiana Supreme Court, in upholding a policy exclusion for property damage arising from an occurrence after the policy period, has stated:

> In the absence of a conflict with statutes or with public policy, insurers have the same rights as do individuals to limit their liability and to enforce whatever conditions they please upon their obligations. In such an event unambiguous provisions in the insurance contract limiting liability must be given effect. *Oceanics, Inc. v. Petroleum Distribution Co.,* 292 So. 2d-190, 192 (La., 1974). See also: *Taillac v. Westminster Corp.* 320 So. 2d 580 (La. App., 4th Cir., 1975).

In the instant case each of the three defendant insurers has a policy limiting coverage to "occurrences" taking place during the policy period. It is therefore the duty of the Court to analyze the provisions of the various policies in the light of the facts in this case to determine where coverage lies.

Coverage by Defendant Aetna:

Defendant Aetna Casualty and Surety Company provided liability insurance to National Gypsum Company from 1954 until January 1, 1971. Aetna has introduced policies covering the period from January 1, 1967 through January 1, 1971 into evidence. Although Aetna admits to coverage from 1954, policies other than those introduced could not be located. For purposes of this opinion, the Court has deemed that the missing policies are identical in content with those introduced into evidence.

The Aetna policies provide that:

> "The Company will pay on behalf of the insured all sums which the insured shall become legally liable to pay as damages because of bodily injury caused by an occurrence . . ."

The term "bodily injury" is defined in pertinent part as "sickness or disease sustained by any person." According to the policy, an "occurrence" includes "continuous or repeated exposure to conditions which unexpectedly caused injury to persons during the policy period."

Therefore, inserting the definitions of the terms "bodily injury" and "occurrence" into the insuring agreement, Aetna's policies provide as follows:

> The Company will pay on behalf of the insured all sums which the insured shall become legally liable to pay as damages because of . . . sickness or disease sustained by any person . . . to which this insurance applies caused by . . . continuous or repeated exposure to conditions which unexpectedly caused injury to persons during the policy period. (Emphasis supplied).

While it must be assumed that Mr. Porter's exposure to asbestos dust during the Aetna policy period contributed to his contraction of the progressive disease of asbestosis, his continued exposure during this period did not result in any manifestation of injury i.e. sickness or disease during the existence of Aetna's coverage. Aetna's policy expired on January 1, 1971 and Mr. Porter's initial hospital admission for shortness of breath did not occur until June of the year.

Accordingly, Mr. Porter did not sustain bodily injury as the result of an occurrence during Aetna's policy period. Aetna's policies covering American Optical from 1954 through January 1, 1971 do not provide coverage for the claims on behalf of Mr. Porter herein.

Coverage by Defendant Hartford:

The Hartford provided coverage to American Optical for the periods January 1, 1971 to January 1, 1974 (pursuant to a policy designated as Hartford #1 hereinafter) and January 1, 1974 to January 1, 1975 (Hartford #2).

Hartford #1 provides coverage for damages incurred by the insured because of bodily injury caused by an occurrence.

"Bodily injury" is defined to include, "sickness or disease sustained by any person." This policy provides that an occurrence is, "injurious exposure to condition which results during the policy period in bodily injury".

Inserting the pertinent definitions into the insuring agreement, Hartford #1 provides:

> The Company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay and damages because of ... sickness or disease sustained by any person ... caused by ... injurious exposure to conditions which results during the policy period in ... sickness or disease....

Hartford #2 is somewhat different in the definitions accorded the pertinent terms. "Bodily injury" is "... sickness or disease sustained by any person which occurs during the policy period, including death at any time resulting therefrom." An "ocurrence" is "... continuous or repeated exposure to conditions which results in bodily injury."

The insuring agreement of Hartford #2 therefore provides that:

> The Company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of ... sickness or disease sustained by any person which occurs during the policy period, including death at any time resulting thereform ... caused by ... continuous or repeated exposure to conditions which results in ... sickness or disease...

Mr. Porter first manifested respiratory illness in the year 1971. Thereafter he was continually treated for lung disease and in April, 1974, became totally unable to perform his job due to his illness. There is no doubt that Mr. Porter sustained illness or disease during the Hartford policy periods. While his illness was not diagnosed as asbestosis until after the expiration of the Hartford's coverage, the Court does not feel that the date of actual diagnosis should be controlling. Mr. Porter became ill during the period of Hartford coverage from a disease which ultimately was determined to be asbestosis. The Court is of the opinion that during the Hartford policy period Mr. Porter was in fact suffering from that disease albeit undiagnosed. Therefore it was not the illness which occurred after the policy period, but the discovery of its asbestos related nature giving rise to liability on the part of American Optical.

In arguing that the date of diagnosis rather than the date of the manifestation of the illness control determination of when the illness occurred, The Hartford cites cases including *Chivolette v. Johns Manville Products Corp.* 319 So. 2d 492 (La. App. 4th Cir., 1975) and *Karjala v. Johns Manville Products*

Corp. 523 F.2d 155 (8th Cir., 1975). However these cases deal with prescription. In such cases the diagnosis of the illness triggers the running of the period for the reason that until diagnosis the injured party was unaware of his possible cause of action. The Court in the instant case is required to interpret the scope of the coverage provided by the policies in question. The policies in question do not restrict coverage to illnesses for which the insured may be liable which are diagnosed during the policy period, but for illness which occurs during the period.

As Mr. Porter's illness occurred during the policy periods of Hartford #1 and #2, recovery for his death thereafter as a result of the illness is plainly provided by Hartford #2.

Coverage by defendant Continental:

Continental Insurance Company provided insurance coverage to American Optical from January 1, 1975 by means of a policy still in effect as of the date of trial of this matter. The Continental policy in question provides:

> The Company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury, to which this insurance applies, caused by an occurrence . . .

"Bodily injury" is defined as ". . . sickness or disease sustained by any person which occurs during the policy period, including death at any time resulting therefrom." An "occurrence" is ". . . continuous or repeated exposure to conditions which results in bodily injury." Accordingly, inserting the pertinent definitions in the insuring agreement, Continental contracted to provide coverage for:

> ". . . all sums which the insured shall become legally obligated to pay as damages because of . . . sickness or disease sustained by any person which occurs during the policy period, including death at any time resulting therefrom . . . caused by . . . continuous or repeated exposure to conditions which results in . . . sickness or disease . . . which occurs during the policy period".

The illness of Mr. Porter first manifested itself in 1971. By April, 1974 Mr. Porter was totally disabled from work and did not work thereafter for American Optical. Although the diagnosis of his illness as asbestosis was not made until February, 1975, the occurrence i.e. exposure to asbestosis dust, occurred prior to 1975 and before Continental undertook coverage for American Optical.

Accordingly, Continental does not provide coverage for the liability of American Optical in the instant lawsuit.

Conclusion:

As indicated previously, analysis of the policies in question reveals that coverage is not provided by defendants Aetna and Continental, as the occurrence giving rise to Mr. Porter's illness and death occurred prior or subsequent to the periods during which said defendants insured American Optical. The occurrence resulting in liability for Mr. Porter's injury and death occurred during the periods of the Hartford's coverage.

With respect to the policy designated as Hartford #1, The Hartford argues that coverage is not afforded by virtue of Exclusion K thereof which provides that the insurance shall not apply:

> "... to bodily injury or property damage resulting from the failure of the named insured's products or work completed by or for the name insured to perform the function or serve the purpose intended by the named insured, if such failure is due to a mistake or deficiency in any design, formula, plan, specifications, advertising material or printed instructions prepared or developed by any insured; but this exclusion does not apply to bodily injury or property damage resulting from the active malfunctioning of such products of work ..."

Prior to the filing of the Hartford's post trial memorandum, the Court was never advised that the applicability of Exclusion K was an issue in this case. Accordingly, the interrogatories

submitted to the jury were not structured so as to elicit the jury's factual determination on the issues underlying the applicability of the exclusion, e.g. whether or not the damage to plaintiff Porter resulted solely from a deficiency in design or from an active malfunctioning of the product. Although apprised by counsel of the possible coverage exclusion, American Optical made no claim to contest it at trial. The Hartford presented no evidence directed to providing the applicability of its exception.

While it is the opinion of the Court that an insurer bears the burden of proving the applicability of an exception to coverage, *Hartford Fire Insurance Co. v. Roger Wilson, Inc.*, 252 So.2d 161, 164 (La. App., 3rd Cir., 1971); *Spiers v. Lane*, 278 So.2d 549, 554 (La. App., 1st Cir., 1973) writs ref. 281 So.2d 749 (La., 1973), the insured in this case never claimed that the exclusion was not applicable. Under the circumstances, it is the Court's opinion that the record does not contain an adequate factual basis for a determination as to the applicability of Exclusion K in this case, nor would it be appropriate for the Court to re-open the matter to allow insurer and insured to present such evidence.

Pretermitting the question of Exclusion K, it is the opinion of the Court, for the reasons hereinbefore set out, that Hartford #1 provides coverage in this case.

It is further the Court's opinion that coverage is provided by Hartford #2. There is no doubt that Mr. Porter was ill—albeit not initially—during the Hartford #2 policy period and that he was exposed to conditions—asbestos dust—during that period prior to his cessation of work due to disability in April, 1974. The Hartford correctly points out that the plaintiff was not working outside the National Gypsum plant at his pumping job during the Hartford #2 policy period, having been transferred inside due to his physical condition. However, he was still exposed to asbestos dust while on his employer's premises. (Deposition of Porter at page 44). The fact that plaintiff was not required by his employer to wear a mask at the

indoor job does not control. Hartford #2 affords coverage to American Optical for damages which the insured is legally obligated to pay because of sickness or disease resulting from continuous or repeated exposure to conditions which result in illness during the policy period. The jury has determined that American Optical is legally obligated to respond in damages to plaintiff. The evidence reveals that Mr. Porter was exposed to asbestos dust and continued to manifest illness during the Hartford #2 policy period. It is therefore the Court's opinion that the policy designated as Hartford #2 provides coverage by its terms to American Optical Corporation for damages assessed by the jury in this case.

Supplemental Brief

1

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No. 81-200

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

AETNA CASUALTY AND SURETY COMPANY,
Petitioner,

v.

CHARLES J. PORTER, AMERICAN OPTICAL CORPORATION, HARTFORD ACCIDENT & INDEMNITY COMPANY, CONTINENTAL INSURANCE COMPANY and AMERICAN MOTORISTS INSURANCE COMPANY,
Respondents.

SUPPLEMENTAL BRIEF IN SUPPORT OF A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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A most significant development that has a direct impact on the issues raised in the Petition for a Writ of Certiorari has occurred since the filing of said Petition. The United States District Court for the District of Massachusetts, considering the issue of insurance coverage for asbestos-related disease cases, has reached a decision directly contrary to the judgment of the Fifth Circuit which is the subject of the Petition for a Writ of Certiorari herein and directly contrary to the holding of the Sixth Circuit in *Insurance Company of North America* v. *Forty-Eight Insulations, Inc.*, 633 F. 2d 1212 (6th Cir. 1980) ["*INA*"], petitions for writ of certiorari pending, Nos. 81-198, 81-199. The newly filed decision of *Eagle-Picher Industries,*

Inc. v. *Liberty Mutual Insurance Co., et al.*, Civil Action No. 78-2939-Z (D. Mass. August 14, 1981) ["*Eagle-Picher*"], which is not yet reported, is reproduced as Appendix "A" hereto.

The immediate importance of the *Eagle-Picher* decision lies in the fact that the District Court, fully cognizant of the opinion of the Fifth Circuit in *Porter* v. *American Optical*, 641 F. 2d 1128 (5th Cir. 1981) ["*Porter*"], and the Sixth Circuit in the *INA* case, reached a conclusion opposite to these courts as to when bodily injury occurs for purpose of determining insurance coverage in asbestos-related disease cases, which conclusion fully reflects the findings of the District Court in *Porter*, Civil Action No. 75-2202 (Slip Op. March 28, 1978).

Petitioner had predicted in its Petition for a Writ of Certiorari that state courts would not follow the decisions of the courts of appeal in the *Porter* and *INA* cases because of the failure of the Fifth and Sixth Circuits to follow state law. The *Eagle-Picher* decision demonstrates that even other federal courts are not inclined to follow the opinions of the Fifth and Sixth Circuits.

The *Eagle-Picher* case is only one of more than twenty pending cases involving the issue of the proper application of liability insurance policies to asbestos-related disease cases. The critical issue in each of these cases is one which has plagued the insurance industry and the courts for several years and will continue to do so unless this Court grants the pending petitions and makes an ultimate determination of this issue.

The issue involved in all of these cases, quite simply, is: "When does 'bodily injury' occur for the purpose of insurance policy application?"

In *Porter* and *INA*, the courts of appeal held that bodily injury occurred each time a microscopic fragment of asbestos fiber became lodged in a person's lung, even though over 90% of the people living in an urban environment have such asbestos in their lungs and only a small percentage of these

persons ever develop asbestos-related disease. (*Eagle-Picher*, Appendix page 11a).

In *Eagle-Picher*, the court determined that there was no bodily injury within the meaning of the insurance policies until such time as a verifiable disease or disability existed. (*Eagle-Picher*, Appendix page 17a). The District Court in *Eagle-Picher* reached this conclusion quite simply through a three-step approach. Initially, the court reviewed the language of the various insurance policies and pointed out that common sense interpretation of such insurance policy language is favored by the courts, not an interpretation based upon sophisticated medical research, and that such a common sense interpretation dictates that bodily injury to an individual occurs only when a person has displayed manifestations of injury or disability. (*Eagle-Picher*, Appendix page 11a-12a).

Secondly, the court pointed out that the medical testimony in that case supported this interpretation because the individual insults of individual asbestos fibers did not constitute bodily injury even from the standpoint of the medical experts. Exposure to asbestos does not produce instantaneous subclinical cellular changes or involve an inevitable process to same. (*Eagle-Picher*, Appendix page 11a). The District Court then reasoned that "to characterize as injury the minimal changes which occur in some people sometime after exposure is not a supportable use of the word 'injury' in the context of a liability insurance policy". (*Eagle-Picher*, Appendix page 11a).

Finally, the court pointed out that policy considerations would lead to a similar conclusion for reasons of certainty and fairness.

Of considerable significance for purposes of the Petition for a Writ of Certiorari is the fact that the District Court determined that its ruling would be the same regardless of whether the *Eagle-Picher* case was determined under the law of the State of Illinois, the State of Ohio, or the law of England. In *INA*, the Sixth Circuit, in purportedly interpreting Illinois law,

reached an opposite conclusion. There now exists the spectre of two conflicting decisions in the federal courts, each purporting to interpret Illinois law and each arriving at opposite conclusions.

As petitioner pointed out in the Petition for a Writ of Certiorari, there exists every likelihood of state courts ignoring the decisions of the Fifth Circuit in *Porter* and the Sixth Circuit in *INA*. Now, a United States District Court has done so. It is even more readily apparent that state courts, interpreting their own law, will feel free to disregard the holdings of the Fifth and Sixth Circuits.

The ultimate horror in such a situation is that many of the larger insurance companies are parties to virtually all of the aforesaid coverage disputes presently in litigation. For example, Liberty Mutual Insurance Company is a party to the *Eagle-Picher* case and the *INA* case and has now been held to differing interpretations of its contracts, both interpretations being based on Illinois law. Therefore, the insurers face the possibility of being bound under certain decisions to one theory of interpretation and under other decisions to another theory. Given the magnitude of asbestos-related disease litigation, this situation is simply intolerable for the insurance industry, the courts and injured persons seeking to recover for asbestos-related illnesses.

When, as here, this Court has been presented with an important issue that will affect pending litigation in numerous circuits, certiorari has been granted.

> "Although there was no conflict between decisions of Circuit Courts of Appeals, we granted certiorari because of the importance of the question and the number of pending cases in which it is presented." (footnotes and citations omitted) *Maass* v. *Higgins*, 312 U. S. 443, 445 (1940).
>
> "In its petition for certiorari the United States, though admitting the absence of a conflicting decision by the Circuit Court of Appeals of any other Circuit, called attention to diverse decisions in the district courts, to the

many other cases pending in which action is awaiting authoritative settlement of the question presented herein, to the large amount of money involved, and to the number of persons whose liability will remain uncertain until the dispute is finally settled. The question thus assumes the importance required by rule 38 and the writ issues accordingly." *United States* v. *Constantine*, 296 U. S. 287, 290 (1935).

Similarly, certiorari has been granted when there is no conflict between the courts of appeals, but the district courts of the various circuits are in conflict, *Curtis* v. *Loether*, 415 U. S. 189, 191 (1974), when there are conflicts between a court of appeals and a court of claims of another circuit, *Goldstone* v. *United States*, 325 U. S. 687, 690 (1945), and when there is a conflict between a circuit court of appeals and a state supreme court, *Dummond* v. *United States*, 324 U. S. 316, 317 (1944).

Given the incredible circumstances surrounding asbestos-related disease litigation and the insurance coverage dilemma which seems to be insoluble except by this Court, this case presents a rare instance where this Court, in implementing the *Erie* doctrine, can forestall years of litigation and mammoth confusion in an area of litigation presently threatening to inundate the court system.

Respectfully submitted,

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APPENDIX "A"

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION 78-2739-Z

EAGLE-PICHER INDUSTRIES, INC.

vs.

LIBERTY MUTUAL INSURANCE COMPANY, AMERICAN MOTORISTS INSURANCE COMPANY, WALBROOK INSURANCE COMPANY, LTD., WINTERTHUR SWISS INSURANCE COMPANY, SOUTHERN AMERICAN INSURANCE COMPANY, MUTUAL REINSURANCE COMPANY, LTD., ST. KATHERINE INSURANCE COMPANY, LTD., LONDON & EDINBURGH GENERAL INSURANCE COMPANY, LTD., BERMUDA FIRE & MARINE INSURANCE COMPANY, LTD., DOMINION INSURANCE COMPANY, LTD., YASUDA FIRE AND MARINE INSURANCE COMPANY (U.K.), LTD., BELLEFONTE INSURANCE COMPANY, TUREGUM INSURANCE COMPANY, LTD., MENTOR INSURANCE COMPANY, (U.K.), LTD., ASSICURAZIONI GENERALI LONDON, STRONGHOLD INSURANCE COMPANY, LTD., EXCESS INSURANCE COMPANY, LONDON & EDINBURGH INSURANCE COMPANY, NATIONAL CASUALTY COMPANY OF AMERICA, LTD., ACCIDENT & CASUALTY INSURANCE COMPANY, ARGONAUT NORTHWEST INSURANCE COMPANY, SLATER, WALKER INSURANCE COMPANY, LTD., JOHN BASIL THOMAS BIRD, a representative underwriter, and PHILIP ALAN FROUDE, a representative underwriter.

MEMORANDUM OF DECISION

ZOBEL, D.J.

This is a declaratory judgment action in which Eagle-Picher Industries, Inc. ("Eagle-Picher") requests a declaration of the rights, liabilities and obligations of the parties to certain insurance contracts. The defendants are insurance companies which had provided Eagle-Picher with primary comprehensive general liability insurance and with first and second layer excess insurance during the years 1968-1979. The questions of interpretation arise because Eagle-Picher has been named as a defendant in approximately 5,500 lawsuits in which the plaintiffs allege that they contracted certain asbestos-related diseases as a result of contract with asbestos-containing products manufactured by Eagle-Picher between 1931 and 1971. The basic question the Court must determine is whether insurance coverage is triggered as of the time or times the claimant was exposed to the asbestos-containing product ("Exposure Theory"), or whether such coverage is triggered when the asbestos-related disease first manifests itself by discoverable and diagnosable signs or symptoms, typically as much as twenty years after the initial exposure ("Manifestation Theory"). Whichever insurance company was "on the risk" at what is determined to be the triggering time or times must provide coverage, including payment of damages and provision of legal defense. The Court's interpretation of the policies will determine which insurance company or companies, if any, must defend against and pay any damages for the increasingly numerous underlying claims against Eagle-Picher. Plaintiff, Liberty Mutual Insurance Company and certain companies and underwriters in the London Market, known in these proceed-

ings as the Bird Defendants[1], espouse the manifestation theory. American Motorists Insurance Company ("American Motorists") and certain other named members of the London Market, the so-called Froude Defendants[2], maintain that only policies in effect at the time of exposure provide coverage.

This opinion constitutes both Findings of Fact and Conclusions of Law.

Prior to 1968 Eagle-Picher was uninsured for the underlying asbestosis and related claims. From January 1968 through 1978 Liberty Mutual provided primary insurance with varying limits. From June 1973 to 1979 plaintiff was covered in addition by, first one and later two layers of excess insurance.

The coverage provided by each excess layer goes into effect only if the policy limits of the layer beneath become exhausted. This three-layer coverage was achieved through the issuance of many short-term policies, by each insurer, typically covering one year at a time. Appendix A provides a graphic representation of the coverages in effect during the relevant period.

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[1] Walbrook Insurance Company, Ltd., Winterthur Swiss Insurance Company, Southern American Insurance Company, Mutual Reinsurance Company, Ltd., St. Katherine Insurance Company, Ltd., London & Edinburgh General Insurance Company, Ltd., Bermuda Fire and Marine Insurance Company (U. K.), Ltd., Dominion Insurance Company, Ltd., Yasuda Fire and Marine Insurance Company (U. K.), Ltd., Bellefonte Insurance Company, Mentor Insurance Company, (U. K.), Ltd., Assicurazioni Generali London, Stronghold Insurance Company, Ltd., London & Edinburgh Insurance Company, National Casualty Company of America, Ltd., Accident & Casualty Insurance Company, Argonaut Northwest Insurance Company, Slater, Walker Insurance Company, Ltd. and John Basil Thomas Bird, a representative underwriter.

[2] Turegum Insurance Company, Ltd., Excess Insurance Company, and Philip Alan Froude, a representative underwriter.

In 1977 Liberty Mutual sent to Eagle-Picher a warning notice that the policy limits for 1974 and 1975 might be exhausted. Eagle-Picher forwarded this notice to American Motorists and the London Market. American Motorists acknowledged receipt of the notice but indicated disagreement with Liberty Mutual's assignment of claims to policy periods and its handling of claims under the manifestation theory. By letter dated October 13, 1977 a New York law firm acting for the entire London Market sent a reservation of rights letter to Eagle-Picher concerning the underlying claims. The reservation of rights is based on the issue whether liability is to be determined under the manifestation or exposure theory. A genuine controversy exists between the parties with regard to the defendants' duties and obligations under their respective policies in connection with the underlying asbestos related claims.

All defendants with interests adverse to those of Eagle-Picher are citizens of states or countries other than Ohio, the state of incorporation of Eagle-Picher and the state where its principal place of business is located.

The insurance policies at issue all contain "coverage" clauses defining in general terms the scope of the coverage. In addition, the policies provide definitions of relevant terms. All are "occurrence-based", that is, coverage is provided for personal injury caused by an "occurrence" during the policy period. The policies, while quite similar, contain minor variations in language and punctuation which do not, however, affect the determination of the question presented so as to produce different results for different insurers. Before analyzing the policies, it is useful to lay out the relevant language.

1. Between January 1, 1968 and January 1, 1978, Liberty Mutual provided the plaintiff with primary comprehensive general liability insurance. The fourteen separate policies contain no more than two variations of each relevant clause. With respect to coverage, one variation, found primarily in policies written during the early years, provides:

> The Company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of . . . bodily injury . . . to which this policy applies, caused by an occurrence . . .

The second variation, found in policies covering January 1, 1976 to January 1, 1978, provides:

> The Company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury due to asbestos exposure caused by an occurrence if the bodily injury is included within the products hazard . . .

The policies include two slightly different difinitions of relevant terms. The first provides:

> *Bodily injury* means bodily injury, sickness or disease sustained by any person.
>
> *Occurrence* means an accident, including continuous and repeated exposure to conditions, which results, during the policy period, in bodily injury or property damage neither expected nor intended from the standpoint of the insured.

The second provides:

> *Bodily injury* means bodily injury, sickness or disease sustained by any person, which occurs during the policy period, including death at any time resulting therefrom.
>
> *Occurrence* means an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected or intended from the standpoint of the insured.

2. From June 1, 1973 to October 1975 American Motorists provided the plaintiff with a first layer excess umbrella policy, containing the following coverage clause:

> The Company agrees to indemnify the insured for all sums which the insured shall become obligated to pay as damages, by reason of liability . . . because of personal injury . . . caused by or arising out of an occurrence which takes place during the policy period anywhere in the world.

The policy also contains the following definitions:

Personal injury means (a) bodily injury, shock, sickness or disease (including death, mental anguish, and mental injury resulting therefrom); . . .

Occurrence means an accident, or a continuous or repeated exposure to conditions which results, during the policy period, in personal injury, . . . property damage or advertising liability neither expected nor intended from the standpoint of the insured . . . .

3. From October 10, 1975 through January 1, 1979 the so-called London Market provided plaintiff with first layer excess umbrella insurance, replacing American Motorist. The "London Market" is a group of insurance underwriters, each of whom underwrites a stated percentage of the total coverage provided by a single policy. The "coverage clause" of the London Market policy provides:

Underwriters hereby agree . . . to indemnify the Assured for all sums which the Assured shall be obligated to pay by reason of the liability . . . imposed upon the Assured by law . . . for damages on account of: Personal Injuries . . . caused by or arising out of each occurrence happening anywhere in the world . . . .

The policy also contains the following definitions:

The term *personal injuries* wherever used herein means bodily injury (including death at any time resulting therefrom,) mental injury, mental anguish, shock, sickness, disease, disability . . . .

The term *occurrence* wherever used herein shall mean an accident or happening or event or a continuous or repeated exposure to conditions which unexpectedly and unintentionally results in personal injury, property damage or advertising liability during the policy period. All such exposure to substantially the same general conditions existing at or emanating from one premises shall be deemed one occurrence.

4. The London Market also provided plaintiff with second layer excess umbrella coverage from September 1, 1973 to January 1, 1979. These second layer policies contain no independent coverage clauses or definitions; instead, they incorporate by reference the terms of the underlying policy. Each policy contains a clause providing for payment of damages "caused by or arising out of each occurrence . . . arising out of the hazards covered by and defined in the underlying umbrella policies . . . ." Thus, between September 1, 1973 and October 10, 1975, the London Market second layer policies provided coverage in accordance with the terms of the underlying American Motorists first layer policy; from October 10, 1975 to January 1, 1979 the London Market second layer policies provided coverage as defined by the London Market's own first layer policies.

All parties to this dispute agree that the relevant policy language is clear and unambiguous. They disagree as to the meaning of the unambiguous language and the Court received certain medical evidence in aid of interpretation.

The coverage clauses, except that in the American Motorists policies, provide indemnity for all sums for which the insured shall become legally obligated to pay [liability imposed by law] for "damages because [by reason or on account] of . . . bodily [personal] injury . . . caused by [or arising out of] an occurrence . . ." American Motorists' differ in that they agree to indemnify with respect to "an occurrence during the policy period."

The terms used in the policy are terms of art. Both "personal" or "bodily injury" and "occurrence" are defined in each policy. Each term of art is linked to the next by the use of causal connectors such as "by reason of" "because of" and "caused by or arising out of." Liability is "caused" by injury, and injury in turn is "caused" by an occurrence. This construction implies that liability, injury, and occurrence, while necessarily connected, are nevertheless distinguishable. It means further that each element is expected to occur separately in time.

All policies except the later group of those written by Liberty Mutual define occurrence as "an accident or a continuous or repeated exposure to conditions which results, during the policy period, in personal injury . . ." This definition is broad and inclusive. Each "occurrence" is made up of two components, initial exposure or accident and resulting injury; neither one without the other would be sufficient. There can be no question but that the aspect of the occurrence which must take place within the policy period, however, is the "result", that is, the time when the accident or injurious exposure produces personal injury. The time-limiting phrase "during the policy period" always follows the word "results" and frequently is set off by commas, so that it can modify only the preceding verb "results". Thus, the definitional language explicitly focuses on the result rather than the cause as the component to which coverage is linked. This is equally true of the American Motorists policies. Even though their coverage clauses refer to "occurrence during the policy period," their definition of occurrence also links the resulting injury, not the exposure to conditions, to the policy period.[3]

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[3] Recently, in *Am. Motorists Ins.* v. *E. R. Squibb & Sons*, 95 Misc. 2d 222, 406 N. Y. S. 2d 658 (1978) the Supreme Court for New York County adopted the manifestation rule in construing, with respect to claims for cervical cancer caused by the drug DES, an American Motorists policy which provided coverage for an "accident or injurious exposure to conditions which results, during the policy period, in bodily injury. . . ." In Squibb, the exposure to the drug occurred in 1952, 1953 and 1961, while the disease only became manifest in 1970, 1971 and 1975, in the daughters of mothers who had ingested the drug. The Court found that "the policy language does not limit coverage to incidents of exposure during the policy period, but rather to conditions which result in bodily injury during the policy period. A reading of the policy language would appear to indicate that coverage is predicated not on the act which might give rise to ultimate liability, but on the result. It would be a strained interpretation to construe the occurrence clause as though it covered "exposure during the policy period which results in bodily injury." It is the result which is keyed to the policy period, and not the accident or exposure." *Id.* at 659-660.

The next question to be determined is what the policies mean by "personal" or "bodily injury" given the diseases which gave rise to the underlying claims. The exposure proponents maintain that "personal injury," within the meaning of these policies, occurs when the first sub-clinical cellular changes take place within the lung. They argue that asbestosis is not a disease at all, but a lengthy injurious process which begins with a series of minute but definite "insults" to the lungs. These insults comprise a succession of separate, compensable personal injuries, each of which, they say, meets the policy's requirement of resulting injury.

The manifestation proponents, on the other hand, contend that with respect to asbestosis, mesothelioma and broncogenic carcinoma, the policy term "personal injury" refers neither to a lengthy process, nor to a series of microscopic "insults", but to clinically evident, diagnosable disease. In the case of asbestosis, they argue, the "result" does not occur until the accumulated depositioning of asbestos fibers in the lung, with its attendant secretion of destructive enzymes, produces such significant interference with lung function that the victim suffers perceptible, measurable symptoms.

The exposure proponents bolster their arguments with sophisticated medical analyses of the fibrosing process from the time of exposure to the time of disability or death; in fact, an appreciation of these medical details is necessary in order to understand the exposure proponents' concept of minute "insults" to the lung. The manifestation proponents, in contrast, argue that the policy terms must be analyzed from a layman's point of view. When this approach is taken, they say, no medical evidence is necessary; instead, the Court need only look to the common and everyday meaning of terms such as "disease" and "injury", in order to conclude that exposure results in injury when it manifests itself through clinically evident disease.

Because these questions were unresolved at the time of trial, and to aid in interpretation of the relevant language the Court received expert medical testimony from Dr. Bernard Gee, a research scientist and clinician with vast experience in the area of asbestos-related disease, and from Dr. Edward Burger, a researcher and administrator whose testimony was based on a review of current literature in the field and not particularly helpful. With minor exceptions, however, the testimony of the experts was not inconsistent. After careful consideration of that medical evidence, the insurance policy language, and the common meaning of the terms employed therein, I find that exposure to asbestos does not "result" in "personal injury" so as to trigger insurance coverage until such time as the accumulation of asbestos fibers in the lungs produce signs and symptoms capable of diagnosis as an asbestos-related "disease," in the commonly understood meaning of the term "disease." This finding is based on several considerations.

First, the testimony of both experts contradicted the central contention of the exposure theory that exposure and injury occur either simultaneously, or so nearly so that coverage for injury can most reasonably be linked to the time of exposure. The testimony of the exposure proponents' own expert, Dr. Gee, made it clear not only that exposure to asbestos typically does not produce clinically evident disease for as much as twenty years, but also that the sub-clinical injuries to the lung produced early in the destructive process do not occur simultaneously with the exposure. Before even subclinical injury can occur, the asbestos fiber must pass a number of dichotomously branching tubes in the nose and throat which get progressively narrower, must reach the lung and become depositioned there, and must be enveloped by a scavenger cell, an alveolar macrophage which may then begin to produce destructive enzymes in a futile attempt to destroy the indestructible asbestos fiber. Because the fiber is not biodegradable, the macrophage continues to secrete enzymes which eventually

destroy surrounding tissue and produce scarring. These tiny lung scars are the "insults" to which the exposure proponents refer. Along the way, nearly all fibers are removed, either through expectoration, by means of the physiological filters in the nose and throat, through being carried back up and out by the mucociliary escalator, or sometimes by being taken away by an alveolor macrophage through the lymphatic system or the mucociliary escalator.[4] Moreover, even when the fiber has become embedded in the lung and the scarring process has begun, the end result, that is, disabling disease or death, is by no means inevitable. In fact, Dr. Gee testified that over 90% of all urban city dwellers have some asbestos-related scarring, but only a tiny percentage of those exposed will ever develop clinical asbestosis. In short, exposure to asbestos does not produce instantaneous sub-clinical cellular changes; some amount of time necessarily passes before any destructive process begins. Also, there is no inevitability to the process—it may simply stop at any point along the way without ever producing clinically evident disease. This being so, to characterize as injury the minimal changes which occur in some people some time after exposure is not a supportable use of the word "injury" in the context of a liability insurance policy.

To say that exposure to asbestos results immediately in personal injury, is unreasonable for another reason. It is a basic tenet of insurance law that unambiguous contract terms are to be given their common, popular and ordinary meaning, 13 J. Appleman Insurance Law and Practice § 7384 (rev. ed. 1976), 43 Am. Jur. 2d Insurance, § 256.[5] Unless the insurance

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[4] It is possible that such removal by a macrophage may, however, occur after insult to the alveolar region of the lung from secretion of enzymes by the same macrophage.

[5] The parties raised before trial the question whether the law of Ohio, of Illinois, or of England should control the interpretation of the insurance contracts at issue here. I find that there is no true conflict among all potentially applicable laws, and therefore I do not reach the question of which state law would be applied to these contracts. *Forsyth* v. *Cessna Aircraft Co.*, 520 F. 2d 608, 612 (9th Cir. 1975).

contract explicitly draws upon a technical or scientific meaning of a term, shared by both parties, the Court is to apply the meaning which a non-specialist would understand. *Lincoln Nat. Life Ins. Co. v. Erickson*, 42 F.2d 997, 1001 (8th Cir. 1930), *Reiser v. Metropolitan Life Ins. Co.*, 28 N.Y.S. 2d 283, 262 App. Div. 171 (1941) *aff'd.* 289 N.Y. 561 43 N.E.2d 534 (1942). In this case, while Eagle-Picher, a large manufacturer, might be expected to have technical knowledge relating to its products and enterprises, it cannot be assumed to have had sophisticated medical knowledge of the biochemical details of the asbestosis process,[6] or to have intended that any abstruse or unusual meanings be given to the terms in its product liability insurance policies. Where there is a conflict between a technical or medical definition and the meaning an average person would apply to an insurance term, the court will accept and apply the layman's viewpoint. *Irelan v. Standard Mutual Assoc.*, Mo. App. 379 S.W. 2d 815 (1964). As a result, the Court must interpret the policy from the point of view of the layman.

The policies define personal injury or bodily injury in lay terms, "bodily injury, shock, sickness or disease (including death, mental anguish and mental injury resulting therefrom.)" The exposure proponents assert that asbestosis is a process, not a disease, and that coverage should be provided for a series of minute personal or bodily insults to the lung. The manifestation proponents point out that all of the underlying claims against Eagle-Picher allege fully manifested asbestos-related diseases, not sub-clinical cellular injuries, and they argue that to a layperson, asbestosis or asbestos-related injury means symptomatic diagnosable disease, regardless of what the terms might mean to a research scientist.

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[6] Dr. Gee agreed that his work is on the cutting edge of one area of the developing science in this field, that indeed, only within the last five to eight years has attention in the field focussed on biochemical cellular changes rather than microscopy and morphology. His testimony is in large part based on that new focus.

Dr. Gee, who is also a clinician with vast treatment experience, proferred his own definition of "asbestosis" as an injury mechanism which is present soon after the first asbestos fiber is embedded in the lung, but went on to distinguish between his specialized meaning of the word in the context of research and the meaning he would give the word as a treating physician. According to Dr. Gee, "when a patient asks 'Do I have asbestosis?' He means: Do I have clinically evident disease by your methods, including my own perceptions, that is, the patient's, ... He doesn't mean: Do I have some injury mechanism going on." Dr. Gee drew the same distinction again when he said, with reference to a patient's history of exposure to asbestos, and the presence of asbestos in his lung, "If I find asbestos, I cannot conclude without other evidence that there is clinical disease. I can conclude that there is an injury mechanism set in motion." That testimony, combined with the ordinary meaning of the coverage language, leads to the conclusion that exposure to asbestos results in "personal injury" when it produces clinically evident diagnosable disease, that is, when it becomes manifest. Although the injurious process begins many years prior to the eventual manifestation of clinical asbestosis, the phrase "results in personal injury" cannot, absent the application of a hypertechnical definition of the words, refer to the earliest sub-clinical cellular damages, but must refer to the time when the individual has clinically evident disease.

The scope of the Court's analysis so far has been limited to an examination of the text of the policies and to a review of the relevant medical testimony. However, because other courts have come to different conclusions and because the rules of construction governing the interpretation of insurance contracts explicitly serve certain public policy goals, it is appropriate to assess the manifestation theory in a broader context.

The Sixth Circuit, in a recent decision, affirmed the District Court's adoption of the exposure theory.[7] It nevertheless concluded that it was "bound to broadly construe the insurance policies to promote coverage." *Ins. Co. America v. Forty-Eight Insulations*, 633 F. 2d 1212, 1219 (6th Cir. 1980)—(hereafter "Forty-Eight"). The underlying facts of the *Forty-Eight* case are, from a public policy point of view, substantially different from those at issue here. In that case, Forty-Eight had purchased liability insurance as far back as 1955, but its coverage starting in 1976 contained such a large per person deductible for asbestos cases that the court found that "as a practical matter, Forty-Eight is uninsured for asbestosis occurring after 1976." *Forty-Eight, supra*, at 1216 n. 6. This consideration led the Court to reject as not controlling precedents in the area of health insurance which it found to be "most relevan[t]."[8] Although the Court acknowledged that these

[7] The *Forty-Eight* opinion was recently adopted both as to "reasoning and result" by the Fifth Circuit, in *Porter* v. *American Optical Corp.*, 641 F. 2d 1128, 1145 (5th Cir. 1981). See also, *Keene Corporation* v. *Ins. Co. of No. Amer.*, No. 78-1011 (D. C. D. C. January 30, 1981).

[8] The cases cited by the Sixth Circuit are part of a line of cases which, interpreting clauses in insurance policies which exclude from coverage any sickness or diseases originating and commencing prior to the issuance of the policy, nevertheless find in favor of coverage where the disease, becomes manifest during the policy period, although the medical cause clearly existed prior to manifestation. See, e. g. *Royal Family Ins. Co.* v. *Grimes*, 42 Ala. pp. 481, 168 So. 2d 262 (1964); *Reiser* v. *Metropolitan Life Ins. Co.*, 262 App. Div. 171, 28 N. Y. S. 2d 283 (1941) *aff'd.* 289 N. Y. 561, 43 N. E. 2d 534 (1942) (Presence of calcium deposits which might never have become a source of physical disturbance not a disease until manifest. The meaning of the agreement must not be that of the scientist but that of the average person.); *Metropolitan Life Ins. Co.* v. *Reynolds*, 48 Ariz. 205, 60 P. 2d 1070 (1936) ("Defendant is liable, though the medical cause of the disease existed prior to the policy, if the disease or sickness does not manifest itself until afterwards. So ordinary men wanting health protection would understand it." 60 P. 2d at 1073); *Fuller* v. *Aetna Life Ins. Co.*, 259 F. 2d 402 (5th Cir. 1958); 10 Couch on Insurance 2d § 41.814 at 639.

cases appeared to support the manifestation theory, it nevertheless held that they in fact supported the exposure theory because "the health insurance cases rely on the same rules of construction that we think are applicable here: insurance policies must be strictly construed in favor of the injured and to promote coverage; similarly a policy must be construed to favor the legitimate expectations of the parties." *Forty-Eight, supra,* at 1221. The Court went on to conclude:

> In this case, we are faced with two possible construcions, one of which is likely to leave the manufacturer insured, the other of which leaves the manufacturer uninsured for all practical purposes. We think that Illinois and New Jersey courts [the states whose law was arguably applicable to the insurance contracts] would try to construe the contract language to embrace the exposure theory. *Forty-Eight, supra,* at 1222.[9]

In the present case, the Court is similarly faced with one construction which would provide coverage, and another which leaves Eagle-Picher uninsured. Here however, it is the manifestation theory which is like to maximize the coverage provided to Eagle-Picher in the underlying lawsuits. As the earlier discussion demonstrates, this court's adoption of the manifestation theory is grounded on a finding that the relevant text of the insurance policies, as explained by the medical evidence dic-

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[9] The *Forty-Eight* decision appears to rest primarily on considerations of policy and result. However, insofar as it is based on review and interpretation of the medical evidence relating to asbestosis, it rests on findings with which I am not in agreement. The Sixth Circuit accepted the notion that every "insult" to tissue in the lungs constitutes "bodily injury" within the meaning of the applicable insurance policies. My review of the medical evidence persuades me that these subclinical changes, only recently identified by the most sophisticated medical research techniques, constitute neither "bodily injury" nor "disease" within the common and ordinary meanings of those terms.

tates manifestation. An additional strand of support for this conclusion, however, is provided by the fact that application of general rules of insurance policy construction, with their public policy underpinnings, produces the same result.

The facts of this case also indicate that manifestation most closely approximates the expectations of the contracting parties. As noted above, Eagle-Picher was uninsured during most of the thiry years up to 1971 during which it manufactured asbestos. Only in 1968 did Eagle-Picher first purchase general liability coverage. During the years after 1971, when Eagle Picher ceased to produce asbestos-containing materials, it nevertheless continued to purchase, and in increasing amounts, insurance coverage for damages due to injury caused by asbestos exposure [See App. A]. Although there was scant possibility that claims based on further exposure to asbestos would be made, it could certainly be predicted that increasingly numerous manifestations of asbestos-related diseases would occur, giving rise to increasingly numerous claims against Eagle-Picher. The fact that Eagle-Picher bought substantial amounts of insurance explicitly keyed to damages due to asbestos exposure during a period when no such exposures were taking place lends yet further support to the conclusion that the expectation of the contracting parties was that coverage would be provided on a manifestation, rather than an exposure, basis.

Having found in favor of manifestation, a workable definition of the term "manifestation" remains to be delineated. The parties have proferred several possibilities. These include the date on which an asbestosis victim "knows or has reason to know" he has the disease, the date on which the victim's symptoms become "capable of medical diagnosis," the date of actual diagnosis, or the date of death. Because of the thousands of underlying lawsuits against plaintiff, each seeking damages for asbestos-related disease, the policies in issue must be

interpreted not only to reflect the manifestation concept, but also to ensure that coverage is certain, and the availability of coverage is easily ascertained and easily demonstrated. I conclude that with respect to all claims under the insurance policies at issue in this case, coverage shall be provided when the asbestos-related disease becomes manifest, as measured by the date of actual diagnosis or, with respect to those cases in which no diagnosis was made prior to death, the date of death. This holding does not require pro rata sharing or apportionment of damages on account of Eagle-Picher's liability for asbestos-related claims.

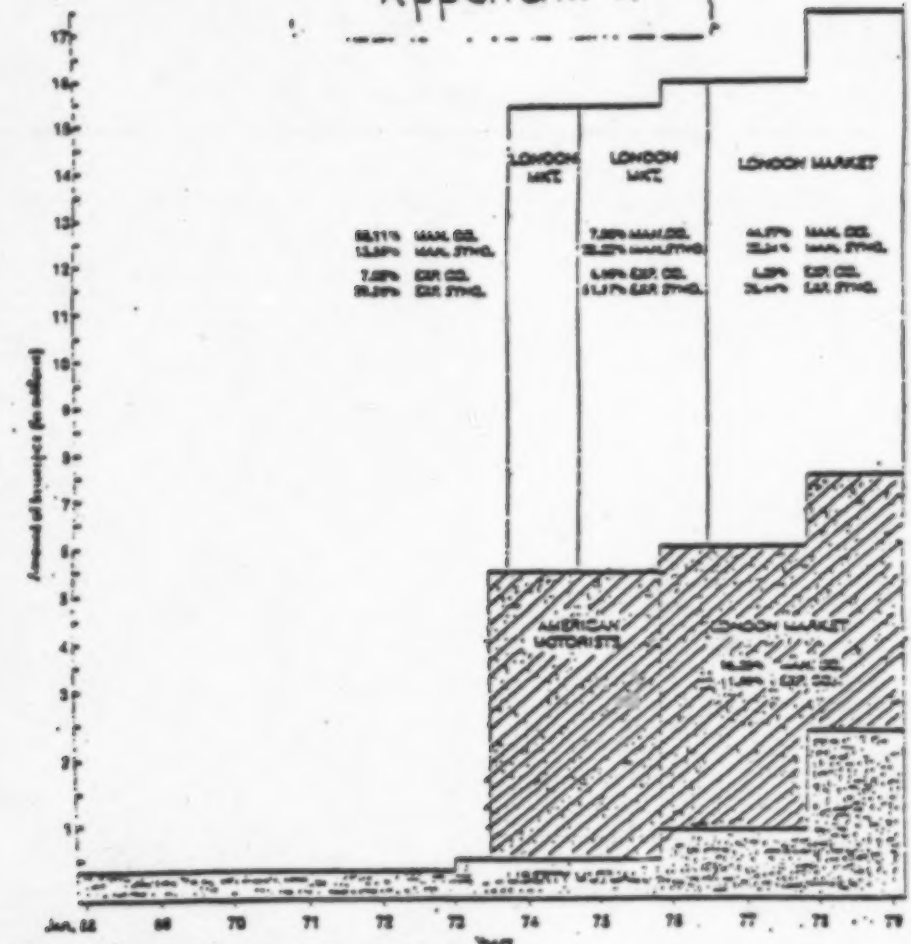
Judgment shall enter in accordance with this opinion.

Rya W. Zobel
District Judge

Date: August 14, 1981

AMOUNT OF INSURANCE
INSURERS

Appendix A



□ - second layer excess
▨ - first layer excess
▤ - primary

APPENDIX "B"

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION 78-2739-Z

EAGLE-PICHER INDUSTRIES, INC.

vs.

LIBERTY MUTUAL INSURANCE COMPANY, AMERICAN MOTORISTS INSURANCE COMPANY, WALBROOK INSURANCE COMPANY, LTD., WINTERTHUR SWISS INSURANCE COMPANY, SOUTHERN AMERICAN INSURANCE COMPANY, MUTUAL REINSURANCE COMPANY, LTD., ST. KATHERINE INSURANCE COMPANY, LTD., LONDON & EDINBURGH GENERAL INSURANCE COMPANY, LTD., BERMUDA FIRE & MARINE INSURANCE COMPANY, LTD., DOMINION INSURANCE COMPANY, LTD., YASUDA FIRE AND MARINE INSURANCE COMPANY (U.K.), LTD., BELLEFONTE INSURANCE COMPANY, TUREGUM INSURANCE COMPANY, LTD., MENTOR INSURANCE COMPANY, (U.K.), LTD., ASSICURAZIONI GENERALI LONDON, STRONGHOLD INSURANCE COMPANY, LTD., EXCESS INSURANCE COMPANY, LONDON & EDINBURGH INSURANCE COMPANY, NATIONAL CASUALTY COMPANY OF AMERICA, LTD., ACCIDENT & CASUALTY INSURANCE COMPANY, ARGONAUT NORTHWEST INSURANCE COMPANY, SLATER, WALKER INSURANCE COMPANY, LTD. JOHN BASIL THOMAS BIRD, a representative underwriter, and PHILIP ALAN FROUDE, a representative underwriter.

JUDGMENT

ZOBEL, D.J.

In accordance with the Memorandum of Decision dated August 14, 1981,

It is declared that the operative date for determining which of the several policies in suit apply to a given claim or lawsuit in which damages are sought from plaintiff, Eagle-Picher Industries, Inc. is the date of actual diagnosis of the asbestos-related disease or, with respect to those cases in which no diagnosis was made prior to death, the date of death.

Rya W. Zobel
District Judge

Date: August 14, 1981

Supplemental Brief

2

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CLERK

No. 81-200

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

AETNA CASUALTY AND SURETY COMPANY,
Petitioner,

v.

CHARLES J. PORTER, AMERICAN OPTICAL CORPORATION, HARTFORD ACCIDENT & INDEMNITY COMPANY, CONTINENTAL INSURANCE COMPANY and AMERICAN MOTORISTS INSURANCE COMPANY,
Respondents.

SECOND SUPPLEMENTAL BRIEF IN SUPPORT OF A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Respondents.

SECOND SUPPLEMENTAL BRIEF IN SUPPORT OF A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

A critical event which petitioner believes must be called to the attention of this Court prior to its consideration of the Petition for a Writ of Certiorari has occurred as a result of an opinion filed on October 1, 1981 by the United States Court of Appeals for the District of Columbia Circuit in the case of *Keene Corporation* v. *Insurance Company of North America, Aetna Casualty and Surety Company, et al.* That opinion, which is not yet published, is included herein as Appendix "A".

The court in that case considered the precise insurance coverage issue which was decided in *Porter* and in the case of *Insurance Company of North America* v. *Forty-Eight Insulations*

(petitions for a writ of certiorari pending, Nos. 81-198, 81-199) and entered a judgment in direct conflict with the holdings of the Fifth Circuit in the *Porter* case and the Sixth Circuit in the *INA* case. The opinion of the court in the *Keene* case is also in direct conflict with the opinion of the United States District Court for the District of Massachusetts in the case of *Eagle-Picher Industries, Inc.* v. *Liberty Mutual Insurance Co., et al.*, (*See* Appendix to Supplemental Brief in Support of Petition), which in turn, is also in conflict with the decisions in *Porter* and *INA*.

The Court of Appeals for the District of Columbia Circuit has refused to follow the holdings of the Fifth Circuit in the *Porter* case and the Sixth Circuit in the *Insurance Company of North America* case, both of which held that insurance coverage is provided by the policy in effect at the time the claimant was exposed to an insured's product. The Court of Appeals for the District of Columbia Circuit in *Keene* has also refused to follow the holding of the court in the *Eagle-Picher Industries* case which held that insurance coverage is provided by the policy in effect at the time of manifestation of a disease. The court in the Keene case has now created a third theory of insurance policy interpretation whereby every insurer of a given insured is responsible for the total liability of that insured, regardless of whether the policies were in effect at the time of the claimant's exposure to the product or whether they were in effect at that time a disease manifested itself.

Thus, four federal courts (in the *Porter, INA, Keene* and *Eagle-Picher* cases) have now considered the issue of insurance policy interpretation in asbestos-related disease cases and have reached three different conclusions and imposed three different standards of interpretation upon the insurers. Aetna, as well as Hartford Accident & Indemnity Company, have now been held to one standard of policy interpretation in the *Porter* case and a second standard in the *Keene* case. Incredibly, Liberty Mutual (which is a party to the *Eagle-Picher* case wherein Aetna and

Hartford are not) has now been held to three differing standards of interpretation of its policy contracts by three federal courts.

The situation of endless conflicting decisions predicted by petitioner in its original petition has now come to fruition even more quickly than anticipated. Utter chaos now exists in the area of interpretation of liability policies in asbestos-related disease cases. As noted in the petition, these cases ultimately involve the proper allocation of hundreds of millions of dollars and threaten to clog if not inundate the courts.

It is therefore respectfully submitted that this Court consider the ramifications of the *Keene* decision, which has created a conflict among the circuits, in ruling upon the Petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS

for the District of Columbia Circuit

No. 81-1179

Keene Corporation

v.

Insurance Company of North America, et al.
Aetna Casualty and Surety Company, Appellant

No. 81-1180

Keene Corporation, Appellant

v.

Insurance Company of North America, et al.

No. 81-1181

Keene Corporation

v.

Insurance Company of North America
Liberty Mutual Insurance Company, Appellant

No. 81-1182

Keene Corporation

v.

Insurance Company of North America, Appellant
Aetna Casualty and Surety Company, et al.

Appeals from the United States District Court
for the District of Columbia
(D.C. Civil Action No. 78-01011)

Argued June 16, 1981

Decided October 1, 1981

John Mahoney, Jr. for Aetna Casualty and Surety Company, appellant in No. 81-1179 and appellee in Nos. 81-1180, 81-1181 and 81-1182.

Eugene R. Anderson with whom *Harold D. Murry, Jr.* and *Jerold Oskinsky* were on the brief for Keene Corporation, appellant in No. 81-1180 and cross/appellee in Nos. 81-1179, 81-1181 and 81-1182.

Robert N. Sayler with whom *John E. Heintz, Scott D. Gilbert* and *Frank H. Griffin, III* were on the brief for Armstrong World Inc., et al. amici curiae urging reversal in Nos. 81-1179 thru 81-1182.

John P. Arness with whom *David J. Hensler* and *Elliott M. Mineberg* were on the brief for Hartford Accident and Indemnity Company, appellee in Nos. 81-1179 thru 81-1182.

Michael R. Gallagher with whom *Thomas E. Betz, Alan M. Petrov, Dennis M. Flannery* and *John Payton* were on the brief for Insurance Company of North America appellee in Nos. 81-1179, 81-1180 and 81-1182 and cross/appellant in No. 81-1181.

Gerald V. Weigle, Jr. with whom *Frank W. Gaines, Jr., Robert L. Hoegele* and *Christopher C. Mansfield* were on the brief for Liberty Mutual Insurance Company, appellee in Nos. 81-1179, 81-1180 and 81-1182 and cross/appellant in No. 81-1181.

Robert O. Tyler entered an appearance for Pennsylvania Manufacturers Association Insurance Company, appellee in Nos. 81-1179, 81-1180, 81-1181 and 81-1182.

Richard A. Epstein and *Leo A. Roth, Jr.* were on the brief for Federal Insurance Company, et al. Amici Curiae urging reversal in Nos. 81-1179, 81-1180, 81-1181 and 81-1182.

Thomas M. Susman was on the brief for Walbrook Insurance Company, LTD., et al. Amici Curiae urging reversal in Nos. 81-1179, 81-1180, 81-1181 and 81-1182.

David Booth Beers and *William R. Galeota* were on the brief for Cassiar Resources Limited, Amicus Curiae urging affirming in part and reversing in part in Nos. 81-1179, 81-1180, 81-1181 and 81-1182.

Daniel J. Papeo, Paul D. Kamenar and *Nicholas E. Calio* were on the brief for The Washington Legal Foundation, Amicus Curiae urging remand for full consideration in Nos. 81-1179, 81-1180, 81-1181 and 81-1182.

Richard H. Gimer, M. Stuart Madden and *Donald E. Santarelli* were on the brief for Commercial Union Insurance Companies, Amici Curiae urging remand for full consideration in Nos. 81-1179, 81-1180, 81-1181 and 81-1182.

Before: BAZELON, *Senior Circuit Judge,* WILKEY and WALD, *Circuit Judges*

Opinion for the Court filed by *Senior Circuit Judge* BAZELON

Opinion filed by *Circuit Judge* WALD concurring in part.

BAZELON, *Senior Circuit Judge:* This case arises out of the growing volume of litigation centering upon manufacturers' liability for disease caused by asbestos products. In this action, Keene Corporation (Keene) seeks a declaratory judgment of the rights and obligations of the parties under the comprehensive general liability policies that the defendants issued to Keene or its predecessors[1] from 1961 to 1980. Specifically, Keene seeks a determination of the extent to which each policy covers its liability for asbestos-related diseases.[2]

Between the years 1948 and 1976, Keene manufactured thermal insulation products that contained asbestos. As a result, Keene has been named as a codefendant with several

other companies in over 6000 lawsuits alleging injury caused by exposure to Keene's asbestos products. Those cases typically involve insulation installers or their survivors alleging personal injury, or wrongful death, as a result of inhaling asbestos fibers over the course of many years. The plaintiffs in the underlying suits allege that they contracted asbestosis, mesothelioma, and/or lung cancer as a result of such inhalation.[3]

From 1961 to the present, Insurance Company of North America (INA), Liberty Mutual Insurance Company (Liberty), Aetna Casualty and Surety Company (Aetna), and Hartford Accident and Indemnity Company (Hartford) issued comprehensive general liability (CGL) insurance policies to Keene. From December 31, 1961 through August 23, 1968, INA insured Keene; from August 23, 1967 through August 23, 1968, Liberty insured Keene;[4] from August 23, 1968 through August 23, 1971, Aetna insured Keene; from August 23, 1971 through October 1, 1974, Hartford insured Keene; and from October 1, 1974 through October 1, 1980, Liberty insured Keene.[5] The policies that these companies issued to Keene were identical in all relevant respects. The coverage language of the policy that Hartford issued to Keene from 1971 to 1974 is typical. It states that

> [t]he company will pay on behalf of the *insured* all sums which the *insured* shall become legally obligated to pay as *damages* because of *bodily injury* . . . to which this insurance applies, caused by an *occurrence*, and the company shall have the right and duty to defend any suit against the *insured* seeking *damages* on account of such *bodily injury* . . . even if any of the allegations of the suit are groundless, false or fraudulent. . . .

E.g., J.A. II at 627. "Bodily injury" is defined as "bodily injury, sickness or disease sustained by any person," *id.* at 663; and "occurrence" is defined as "an accident, including injurious exposure to conditions, which results, during the policy period, in *bodily injury* . . . neither expected nor intended from the standpoint of the *insured*. *Id.* at 664.[6]

Keene tendered the asbestos-related damage cases to its insurance companies for defense and indemnification. Each company, however, either denied all responsibility for the suits or accepted only partial responsibility. Memorandum op. at 2 (J.A. IX at 3532).

On June 6, 1978, Keene filed this suit for a declaratory judgment and damages in the United States District Court for the District of Columbia. Keene contended that any stage in the progression of an asbestos-related disease triggers coverage of Keene's entire liability under each of the policies. Aetna, INA, and Liberty argued that coverage is triggered only when bodily injury manifests itself during a policy period. Hartford took an intermediate position, arguing that coverage is triggered by the inhalation of asbestos fibers, but that each company's coverage is determined by the ratio of exposure years during its policy period to the entire period of inhalation.

Keene and Hartford filed motions for partial summary judgment based on their respective theories of coverage, and Aetna filed a motion for summary judgment asserting that no case or controversy had been presented. On January 30, 1981, the district court granted Hartford's motion; it granted in part and denied in part Keene's motion; and it denied Aetna's motion. The district court held that indemnification and defense costs should be prorated among the insurance companies according to the relative extent of exposure during their respective policy periods. The district court also held that Keene is liable for a pro-rata share of the costs when exposure occurred during a period during which Keene was uninsured. J.A. IX at 3537-38.

Pursuant to 28 U.S.C. § 1292(b) (1976), the district court, *sua sponte*, certified its order for interlocutory appeal. INA, Liberty, Aetna, and Keene filed Petitions for Leave To Appeal, and on February 20, 1981, this court granted those petitions and ordered that the appeals be consolidated and expedited.

We reverse the district court's order and remand the case for trial on the issues of damages and on the issue of the applicability of Liberty's 1967 policy.[7]

I. JUSTICIABILITY

Aetna argues that Keene's declaratory judgment action does not present a case or controversy. Aetna asserts that Keene must raise insurance coverage issues in the context of a particular case in which an insurance company has refused to defend or indemnify Keene. We disagree.

The standard for finding a justiciable "case or controversy" in a declaratory judgment action is no less demanding than the standard in any other type of action. *Federation of Labor v. McAdory*, 325 U.S. 450, 461 (1944); *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-41 (1937). The dispute "must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." *Aetna, supra*, 300 U.S. at 241. This standard was illuminated by Justice Murphy in *Maryland Casualty Co. v. Pacific Co.*, 312 U.S. 270 (1941), where he stated that "the question [of justiciability] in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Id.* at 273. *See generally* WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE (1973) § 2757.

This suit by Keene does not present a hypothetical set of facts. Keene has been, and will continue to be, sued for injuries that result from the use of its asbestos products. For each of these suits—past, present, and future—the rights and obligations of Keene and its insurers must be resolved. There can be no question that the interpretation of the contracts at issue in this case presents a "real and substantial controversy" that can be specifically resolved by a decision in this case.

Aetna implies that the rights and obligations created by the insurance policies cannot be determined without consideration of the facts of a particular tort suit. We have before us, however, the terms of the insurance policies and the facts of the particular types of diseases whose coverage is at issue. We are not aware or informed of any facts that would come to light in a particular tort suit that would be relevant to the determination of the policies' applicability to Keene's liability for asbestos-related injury. We hold, therefore, that the case is justiciable.[8]

II. Coverage of the Insurance Policies

The language of each policy at issue in this case clearly provides that an "injury," and not the "occurrence" that causes the injury, must fall within a policy period for it to be covered by the policy. Most suits brought under this type of policy involve an injury and an occurrence that transpired simultaneously, or, at least, in close temporal proximity to one another. In cases involving asbestos-related disease, however, inhalation—the "occurrence" that causes the injury—takes place substantially before the manifestation of the ultimate injury—asbestosis, mesothelioma, or lung cancer.[9] Furthermore, inhalation may occur over a long period of time. As a result, inhalation may continue through numerous policy periods, the disease may develop during subsequent policy periods, and manifestation may occur in yet another policy period. For an insured such as Keene, different insurers are likely to be on the risk at different points in the development of each plaintiff's disease. Moreover, part of the development may occur at a time when no insurer was on the risk. Asbestos-related diseases, which are certainly covered by the policies, therefore differ from most injuries and hence present a difficult problem of contractual interpretation.

Neither the case law[10] nor the terms of the policies lead us directly to a resolution of the coverage issues raised in this case. Unfortunately, the insurance companies failed to develop policy language that would directly address the full complexity en-

tailed by asbestos-related diseases. We have sought, however, to interpret these contracts in a manner that is equitable and administratively feasible and that is consistent with insurance principles, insurance law, and the terms of the contracts themselves.

We conclude that each insurer on the risk between the initial exposure and the manifestation of disease is liable to Keene for indemnification and defense costs. If possible, the factual predicate for the allocation of costs among insurers should be based on the facts of the underlying tort suit. If, however, the tort doctrine governing the underlying suit does not require proof of facts that would form a sufficient basis upon which to allocate insurance liability, then the necessary facts may be determined independently of that suit.[11]

In construing the policies' coverage of liability for asbestos-related diseases, our objective must be to give effect to the policies' dominant purpose of indemnity. COUCH ON INSURANCE 2d, §§ 15:22, 15:41 (2d ed. Anderson 1959); 4 WILLISTON ON CONTRACTS, § 900 (3d ed. Jaeger 1959). An insurance contract represents an exchange of an uncertain loss for a certain loss. In a comprehensive general liability insurance policy, the uncertain loss is the possibility of incurring legal liability, and the certain loss is the premium payment. By issuing the policy, the insurer agrees to assume the risk of the insured's liability in exchange for a fixed sum of money. At the heart of the transaction is the insured's purchase of certainty—a valuable commodity. *See* S. HUEBNER, K. BLACK, JR., R. CLINE, PROPERTY AND LIABILITY INSURANCE (2d ed. 1976) 5-7. This view of the insurance policies provides the starting point for analysis.

The next question must be "certainty with respect to what contingencies?" For an insured is only entitled to indemnity for losses that are covered by its policy. We are aided in our analysis of these policies' coverage by the well-accepted rule

that ambiguity in an insurance contract must be construed in favor of the insured. *See, e.g., Blue Anchor Co. v. Pennsylvania Lumberman's Ins. Co.*, 385 Pa. 394, 123 A.2d 413 (1956); COUCH ON INSURANCE 2D, § 15:14 (2d ed. Anderson 1959); WILLISTON ON CONTRACTS, § 621 (3d ed. Jaeger 1959). We believe, however, that although particular terms of the policies are ambiguous as applied to asbestos-related diseases, the principles embodied in the insurance policies provide a sufficient basis upon which to decide this case. In discerning those principles, our guide is—as it must be—the reasonable expectations of Keene when it purchased the policies. *See, e.g., Steven v. Fidelity & Cas. Co.*, 58 Cal.2d 862, 868-70, 377 P.2d 284, 288-89, 27 Cal.Rptr. 172, 176-77 (1962); *Allen v. Metropolitan Life Ins. Co.*, 44 N.J. 294, 305, 208 A.2d 638, 644 (1965); *Collister v. Nationwide Life Ins. Co.*, 479 Pa.579, 388 A.2d 1346 (1978); COUCH ON INSURANCE 2D, § 15:16 (2d ed. Anderson 1959).[12]

The anaylsis of the insurers' duty to indemnify Keene is divided into three logical steps: first, the trigger of coverage under the policies; second, the extent of coverage once a policy is triggered; and third, the allocation of liability among insurers if more than one policy is triggered. That analysis is followed by an examination of the insurers' duty to defend Keene and a discussion of the procedural mechanisms by which asbestos-injury stuits can be adjudicated.

A. Trigger of Coverage

The first step in the analysis of this problem is to determine what events, from the point of exposure to the point of manifestation, trigger coverage under these policies. In the language of the policies, the question is: when did "injury" occur? Both Keene and Hartford advance slightly different versions of the "exposure theory" of coverage. Keene argues that successive coverage is triggered by both exposure to asbestos dust ("inhalation exposure")[13] and the subsequent development of disease ("exposure in residence").[14] Keene

bases its argument on medical evidence that the body incurs microscopic injury as asbestos fibers become lodged in the lungs and as the surrounding tissue reacts to the fibers thereafter. Hartford also argues that successive coverage is triggered by continued exposure. Its argument is similarly based on the medical evidence of discrete tissue damage as each asbestos fiber reaches the lungs. For no apparent reason, however, Hartford asserts that the continued progression of disease following exposure does not trigger additional coverage.[15] Basing its decision on *Insurance Co. of N. America v. Forty-Eight Insulations*, 633 F.2d 1212 (6th Cir. 1980), *aff'd on rehearing*, Nos. 78-1322-1326 (Mar. 9, 1981), the district court adopted Hartford's version of the exposure theory.[16]

INA, Liberty, and Aetna advance the "manifestation" theory of coverage. They argue that coverage is triggered only by the manifestation of either asbestosis, mesothelioma or lung cancer. They assert that their interpretation of the contracts is supported by the ordinary meaning of the terms "bodily injury, sickness or disease." They claim that "bodily injury" does not occur until cellular damage advances to the point of becoming a recognizable disease. INA and Liberty rely on cases in other areas of the law—workmen's compensation, health insurance coverage, and statues of limitations—that support their interpretation of the term "injury." *E.g., Travelers Insurance Co. v. Cordillo*, 225 F.2d 137 (2d Cir. 1955) (Workmen's compensation), *cited in* Liberty's brief at 42-44 and INA's brief at 28; *Reiser v. Metropolitan Life Insurance Co.* 262 App.Div. 171, 28 N.Y.S.2d 283 (1941) (health insurance), *cited in* Liberty's brief at 45 and INA's brief at 26; *Uris v. Thompson*, 337 U.S. 163 (1949) (statute of limitations), *cited in* INA's brief at 27.

The policy language does not direct us unambiguously to either the "exposure" or "manifestation" interpretation. In the context of asbestos-related disease, the terms "bodily injury," "sickness" and "disease," standing alone simply lack the precision necessary to identify a point in the development of a

disease at which coverage is triggered. The fact that a doctor would characterize cellular damage as a discrete injury does not necessarily imply that the damage is an "injury" for the purpose of construing the policies. At the same time, the fact that an ordinary person would characterize a fully developed disease as an "injury" does not necessarily imply that the manifestation of the disease is the point of "injury" for purposes of construing the policies. In interpreting a contract, a term's ordinary definition should be given weight, but the definition is only useful when viewed in the context of the contract as a whole.

Moreover, the legal definition of "injury" in other contexts informs the term's definition in this case only if the term operates in a functionally similar manner in the other contexts. In the areas of workmen's compensation, health insurance, and statutes of limitations, the concept of "injury" performs a function that is different from its function in the context of comprehensive general liability policies.[17] Therefore, the term's definition in those contexts is only minimally relevant to the question at hand. Instead, the purpose of the insurance policies must inform our construction of the term "injury".

If exposure to asbestos were deemed to constitute a discrete injury and thereby trigger coverage, as Hartford and Keene suggest, the subsequent development of a disease would be characterized best as a consequence of the injury. Future stages of development would not constitute new injuries[18] and therefore would not trigger additional coverage.[19] Under that interpretation, a manufacturer who bought a comprehensive general liability policy would not bear the risk of liability for diseases that occurred due to exposure during a covered period. It would, however, bear the risk of liability for diseases that manifest themselves during the covered period, but that occur because of exposure at a time when the manufacturer held no insurance. As a result, the manufacturer's purchase of insurance would *not* constitute a purchase of certainty with respect to

liability for asbestos-related diseases. The insured would remain uncertain as to future liability for injuries whose development began prior to the purchase of insurance. There is no indication that such a de facto exclusion of coverage from the policies was in the contemplation of any party to the contracts in this case. At the least, such an exclusion is inconsistent with Keene's reasonable expectations when it purchased the policies. The policies state that the insured is covered for "injury" during the policy period. In purchasing such coverage, Keene could have reasonably expected that it was covered for all future liability, except liability for injuries of which Keene could have been aware prior to its purchase of insurance. A latent injury, unknown and unknowable to Keene at the time it purchased insurance, must, at least, be covered by an insurer on the risk at the time it manifests itself. Any other result would violate very reasonable expectations of Keene. Therefore we hold that manifestation of disease is one trigger of coverage under the policies.[20]

In *American Motorists Ins. Co. v. Squibb*, 95 Misc.2d 222, 406 N.Y.S.2d 658 (1978), the court faced an issue similar to the one in this case, under an insurance policy that was similar in all relevant respects to the policies we have before us. That case involved a drug manufacturer's liability for cancer that was caused by the ingestion of DES by the victims' mothers during pregnancy many years earlier. Squibb argued that the insurance company on the risk at the time of the disease's manifestation was obligated to pay the damages. The insurance company responded by arguing that the injury occurred when the victims' mothers ingested the drug and not when the disease manifested itself. The court held that "bodily injury" occurred when the cancer manifested itself. The court stated that "the policy language does not limit coverage to incidents of exposure during the policy period, but rather to conditions which result in bodily injury during the policy period." *Id.* at 659. That court did not have to determine the liability of an insurer that was on the risk prior to the diseases' manifestation.

Thus, if the purpose of the policies is not to be undercut, the manifestation of disease must constitute an "injury". Any characterization of exposure as a *discrete* injury, therefore, must be rejected. This is the same result that courts have reached in determining when an injury or disease begins for purposes of health and accident insurance policies. In those cases, courts have held that a manifestation rule is necessary to protect the reasonable expectations of the insured. *E.g., Silverstein v. Metropolitan Life Ins. Co.*, 254 N.Y. 81, 171 N.E. 914 (1930); *Cohen v. North American Life & Casualty Co.*, 150 Minn. 507, 185 N.W. 939 (1921). In health and accident insurance policies, as in liability insurance policies, the purpose of the contracts would be defeated if the insured had to bear the risk of disease that is latent at the time a policy is purchased. *See* Comment, *Liability Insurance for Insidious Disease: Who Picks Up the Tab?* 48 FORDHAM L.REV. 657, 671 (1980) (this rule is necessary to provide security policyholder seeks).

None of this implies, however, that insurance policies may not also be triggered prior to manifestation. In fact, we conclude that coverage is also triggered by both inhalation exposure and exposure in residence.

To demonstrate why the policies require that both exposure and manifestation trigger coverage, we begin by positing a rule in which manifestation is the *sole* trigger of coverage. If that interpretation were adopted, as INA, Liberty, and Aetna propose, Keene would not be covered for diseases manifesting themselves after 1976.[21] By that time, it was widely known that prolonged inhalation of asbestos has a high probability of causing disease.[22] From about then on, insurance companies ceased issuing policies that adequately cover asbestos-related disease. Yet we can still expect thousands of cases of those diseases to manifest themselves throughout the rest of the century. If we were to hold that only the manifestation of disease can trigger coverage, the insurance companies would have to bear only a fraction of Keene's total liability for asbestos-related diseases.

The possibility of that result would undermine the function of the insurance policies. When Keene purchased the policies, it could have reasonably expected that it was free of the risk of becoming liable for injuries of which it could not have been aware prior to its purchase of insurance.[23] There is no doubt that these losses would be covered if the diseases at issue developed spontaneously upon inhalation. Inhalation of asbestos is an "occurrence" that causes injury for which Keene may be held liable. The possibility that the insurers may not be liable arises solely because there is a period of time between the point at which the injurious process began and the point at which injury manifests itself. In this case, during that interim period, the existence of latent injury among people who had worked with asbestos became predictable with a substantial degree of certainty. The injury and attendant liability became predictable precisely because it was discovered that past occurrences were likely to have set in motion injurious processes for which Keene could be held liable. To accept the argument that *only* manifestation triggers coverage—and allow insurers to terminate coverage prior to the manifestation of many cases of disease—would deprive Keene of the protection it purchased when it entered into the insurance contracts. We, therefore, reject the manifestation theory as presented by INA, Aetna, and Liberty,[24] because it does not allow exposure, as well as manifestation to trigger insurance coverage.

Thus, in order for Keene's rights under the policies to be secure, both inhalation exposure and exposure in residence must also trigger coverage. Regardless of whether exposure to asbestos causes an immediate and discrete injury, the fact that it is part of an injurious process is enough for it to constitute "injury" under the policies.

This conclusion is consistent with the law involving insurance coverage of losses that begin during a period of coverage but continue to develop after a policy's expiration. For example, *Snapp v. State Farm Fire & Cas. Co.*, 206 Cal.App.2d

827, 24 Cal. Reptr. 44 (1962), involved a fire insurance policy that included coverage of most types of physical damage to property. The policy was issued on the plaintiff's house, which had been damaged due to movement of the land under the house. While the land was still unstable, the policy expired, and the insurer sought to limit its liability to the amount of damage that had occurred prior to the policy's termination date. The court held that the insurer's liability was not so limited, and that it had to indemnify the policyholder for all damage caused until the land movement ceased. The court stated that "[t]o permit the insurer to terminate its liability while the fortuitous peril which materialized during the term of the policy was still active would not be in accord either with applicable precedents or with the common understanding of the nature and purpose of insurance." *See also Pruitt v. Hardware Dealers Mutual Fire Ins. Co.*, 155 F. Supp. 612 (1957) (insurer cannot terminate property loss or fire protection while land remains unstable).

These cases illustrate the principle that when it becomes known that an occurrence has set in motion a process that has a significant probability of resulting in a covered loss, the insurer on the risk at that time is liable for the full loss. It does not matter whether the insurer learns of a progressing loss through direct observation, as in *Snapp*, or through statistical inference as in asbestos-injury cases. It is the use of that knowledge to shift a covered risk back to the insured th[illegible] is not permitted.[25]

In sum, the allocation of rights and obligations established by the insurance policies, would be undermined if either the exposure to asbestos or the manifestation of asbestos-related disease were the *sole* trigger of coverage. We conclude, therefore, that inhalation exposure, exposure in residence, and manifestation all trigger coverage under the policies. We interpret "bodily injury" to mean any part of the single injurious process that asbestos-related diseases entail. We now proceed to consider the extent to which an insurer is liable to its policyholder once coverage under its policy is triggered.

B. The Extent of Coverage

The policies at issue in this case provide that the insurance company will pay on behalf of Keene "all sums" that Keene becomes legally obligated to pay as damages because of bodily injury during the policy period. We have defined "bodily injury" to mean any part of the injurious process that begins with an initial exposure and ends with manifestation of disease. As a result, when Keene is held liable for an asbestos-related disease, only part of the disease will have developed during any single policy period. The rest of the development may have occurred during another policy period or during a period in which Keene had no insurance. The issue that arises is whether an isurer is liable in full, or in part, for Keene's liability once coverage is triggered. We conclude that the isurer is liable in full, subject to the "other insurance" provisions discussed in section C below.

Hartford argues that each insurer is required to pay only a pro-rata share of Keene's liability. Once an insurer's coverage is triggered, its share would be determined by the duration of a plaintiff's exposure to Keene's products during its policy periods in relation to the entire duration of the plaintiff's exposure to Keene's products. Under Hartford's scheme, if there is a period of exposure during which Keene is uninsured, then Keene would bear a pro-rata share of the liability.[26]

Hartford's argument is based on its characterization of asbestos-related diseases as consisting of a multitude of discrete injuries to the lung tissue. We have declined, however, to rely on that factual characterization in determining the trigger of insurance coverage,[27] and we decline to rely on it in determining the extent of coverage. Instead, we continue to rely on the terms of the contracts and the principles they embody.

Our starting point is the interpretation of the policies as the insurers' promises of certainty to Keene. The policies that were issued to Keene relieved Keene of the risk of liability for latent

injury of which Keene could not be aware when it purchased insurance. Keene did not expect, nor should it have expected, that its security was undermined by the existence of prior periods in which it was uninsured, and in which no known or knowable injury occurred.[28] If, however, an insurer were obligated to pay only a pro-rata share of Keene's liability, as the district court held, those reasonable expectations would be violated. Keene's security would be contingent on the existence and validity of all the other applicable policies. Each policy, therefore, would fail to serve its function of relieving Keene of the risk of liability. The logical consequence of this is that the policies must require that once an insurer's coverage is triggered, the insurer is liable to Keene to the full extent of Keene's liability up to its policy's limits, but subject to "other insurance" clauses, discussed in section C, below.

Judge Wald suggests that the rationale of our decision is consistent with prorating insurance obligations to Keene for the years in which it was "self-insured." Judge Wald believes such a pro-rata allocation is fair, and we do not think her view is unreasonable. As we have just shown, however, such an allocation is inconsistent with the terms and underlying principles of the insurance policies at issue in this case.

We read Judge Wald's reasoning as follows: 1) As the court interprets the term, an asbestos-related "injury" occurs over a long period of time; 2) if Keene was uninsured during part of that time, then Keene is not covered for the full injury; 3) therefore, Keene should pay a pro-rata share of its own liability.

If we read Judge Wald correctly, her position is problematic. Although we have defined the term "injury," we have done so only as an incidental aspect of a logically prior determination of Keene's rights under the policies viewed in their entirety. The insurance policies provide Keene with the right to be free of all liability for asbestos-related disease, unless such a disease was known or knowable by Keene at the time it

purchased an insurance policy.[29] For that right to be preserved, each policy that Keene purchased between an initial exposure and the ultimate manifestation of a disease must be triggered. In a sense, that means that "injury" occurred during each of the policy periods. It does not mean, however, that there was some "injury" that did *not* occur during a policy period. That conclusion and the implication that the insurers are not obligated to indemnify Keene in full contradicts the first and foremost aspect of our decision—our holding that each policy provides Keene with the right to be free of liability for asbestos-related disease.

As stated above, each policy has a built-in trigger of coverage. Once triggered, each policy covers Keene's liability. There is *nothing* in the policies that provides for a reduction of the insurer's liability if an injury occurs only in part during a policy period. As we interpret the policies, they cover Keene's entire liability once they are triggered. That interpretation is based on the terms of the policies themselves. We have no authority upon which to pretend that Keene also has a "self-insurance" policy that is triggered for periods in which no other policy was purchased. Even if we had the authority, what would we pretend that the policy provides? What would its limits be? There are no self-insurance policies, and we respectfully submit that the contracts before us do not support judicial creation of such additional insurance policies.

Hartford argues that this allocation of liability allows Keene to "enjoy the benefits of insurance coverage which it has never paid for." Hartford's brief at 31.[30] The contrary point, however, is more accurate: For an insurer to be only partially liable for an injury that occurred, in part, during its policy period would *deprive* Keene of insurance coverage for which it paid. With each policy, Keene paid for insurance against all liability for bodily injury. The policies do not distinguish between injury that is caused by occurrences that continue to transpire over a long period of time and more common types of

injury.[31] Nor do the policies provide that "injury" must occur *entirely* during the policy period for full indemnity to be provided.

In support of its argument for pro-rata apportionment of liability, Hartford asserts that the liability scheme we now adopt would leave an insured equally off with one year of insurance coverage as it would be with several years of coverage. *Id.* That assertion is inapposite for two reasons. First, as a matter of probability, the more years of coverage that an insured has purchased, the smaller will be the number of injuries for which it will be liable. An insured will not be covered for an injury if it has insurance neither when a plaintiff's disease was developing nor when the disease manifested itself.[32] Second, and perhaps more important, because we hold below that only one policy's limits of liability may apply to one injury,[33] an insured who has purchased several policies that cover an injury will only be able to collect under one of those policies, even though he paid for several. Therefore, the insurer—not the insured—who reaps the most benefit from the similarity of treatment between an insured with one year of coverage and an insured with several years of coverage.[34]

Not surprisingly, the policies do not explicitly provide a means of applying the limits of liability to injuries that are covered by multiple policies. Keene claims that it is entitled to full indemnity for each injury up to the *sum* of the limits provided by the applicable policies. We do not agree. The principle of indemnity implicit in the policies requires that successive policies cover single asbestos-related injuries. That principle, however, does not require that Keene be entitled to "stack" applicable policies' limits of liability. To the extent possible, we have tried to construe the policies in such a way that the insurers' contractual obligations for asbestos-related disease are the same as their obligations for other injuries.

Keene is entitled to nothing more. Therefore, we hold that only one policy's limits can apply to each injury. Keene may select the policy under which it is to be indemnified. *Cf. Forty-Eight, supra,* 633 F.2d at 1226 n.28.

C. Allocation of Liability

In any suit against Keene for an asbestos-related disease, it is likely that the coverage of more than one insurer will be triggered. Because each insurer is fully liable, and because Keene cannot collect more than it owes in damages, the issue of dividing insurance obligations arises. The only logical resolution of this issue is for Keene to be able to collect from any insurer whose coverage is triggered, the full amount of indemnity that it is due, subject only to the provisions in the policies that govern the allocation of liability when more than one policy covers an injury. That is the only way that Keene can be assured the security that it purchased with each policy. Our holding each insurer fully liable to Keene is also consistent with other courts allocation of liability when more than one insurer covers an indivisible loss. *E.g., Groul Construction Co. v. Insurance Company of North America,* 11 Wash.App. 632, 524 P. 2d 427 (1974) (continuous damage to property insurance policy).

This does not mean that a single insurer will be saddled with full liability for any injury. When more than one policy applies to a loss, the "other insurance" provisions of each policy provide a scheme by which the insurers' liability is to be apportioned. For instance, INA's policy states:

> [W]hen both this insurance and other insurance apply to the loss on the same basis, whether primary, excess or contingent, INA shall not be liable under this policy for a greater proportion of the loss than stated in the applicable contribution provision below.

J.A. II at 550-51. The contribution provision referred to contains formulae for "contribution by equal shares" and for "contribution by limits," depending upon the provisions of other applicable policies.[35] These provisions of the policies must govern the allocation of the liability among the insurers in any particular case of asbestos-related disease. However, the primary duty of the insurers whose coverage is triggered by exposure or manifestation is to ensure that Keene is indemnified in full.[36]

D. Costs of Defending Suits Against Keene

The policies provide that the insurer shall defend any suit against Keene for damages due to bodily injury, even if the suit is groundless, false or fraudulent. The insurers' duty to defend Keene and to pay Keene for its defense costs are more broad than their duty to indemnify Keene. As long as a complaint indicates that Keene may be liable for an injury, an insurer must defend Keene if the facts alleged in the complaint indicate that its policy covers the alleged injury. Because we hold that each insurer is fully liable to Keene for indemnification, it follows that each is fully liable for defense costs.[37]

Of course, only the insurer that Keene selects will defend Keene. The duty of that insurer is simply to defend Keene, not to minimize its own liability. As we state below, the factual basis of the insurers' contract obligations may be developed independently of the factual basis of the tort suit. If it is possible to resolve both the tort dispute and the insurance contract dispute together, without disrupting the tort victim's suit and without imposing undue inconvenience on the victim, a trial court may do so. Otherwise the two disputes should be resolved separately. This should eliminate the possibility that the insurer that represents Keene at trial will attempt to skew the factual record to the disadvantage of other insurers.[38]

E. Resolution of Factual Issues

In a typical suit for products liability, the same set of facts would prove both the manufacturer's tort liability and the insurer's contractual liability. That is not true of suits that arise out of an asbestos-related disease. The leading case concerning manufacturers' liability for asbestos damage claims is *Borel v. Fibreboard Paper Products Corp.*, 493 F.2d 1076 (5th Cir. 1973), *cert. denied* 419 U.S. 896 (1974). The court in *Borel* held that each manufacturer who contributed in any way, and at any time, to a claimant's bodily injury is fully liable for all of the resulting damages. If a victim was exposed to the produts of more than one manufacturer, each manufacturer is jointly and severally liable to the victim. *See also Karjala v. Johns Manville Products Corp.*, 523 F.2d 155 (8th Cir. 1975). As a result, a plaintiff in a suit against Keene need not prove the full extent of his or her exposure to asbestos. Yet that set of facts is essential to determining which policies cover Keene's liability.

The doctrine of joint and several tort liability in this context is an accepted means of vindicating the rights of the tort victims. Nothing that we decide concerning the contractual liability of the insurers to Keene should impair the tort plaintiff's prosecution of his or her suit.[39]

Thus initially, the full insurance obligation to Keene must be divided among the insurers whose policies are triggered based on the facts brought out in the tort suit against Keene. The possibility of additional coverage can be determined consensually among insurers, or it can be adjudicated among insurers in a subsequent law suit. At that point the insurance obligations can be reallocated among all the insurers whose policies are found to cover a particular injury.[40] Any facts concerning the period of exposure or the point of manifestation that are proved in an underlying tort suit need not be legally dispositive of a dispute among insurers concerning allocation of their liability. Perhaps if the underlying tort suit would not be

disrupted and the plaintiff would not be put to undue inconvenience, the factual record needed to allocate insurance responsibility may be developed during the course of the underlying tort suit.[41]

If a victim sues more than one asbestos-product manufacturer, it may be impossible to prove which company's products were used at which time. If so, it will be impossible to prove that exposure to Keene's products—as opposed to those of another manufacturer—occurred during a particular time period. In such a case, there should be a presumption that throughout the victim's period of exposure to asbestos he or she was exposed to Keene's and the other manufacturers' products. The insurer defending Keene in the underlying tort suits may then try to show that Keene's products could not have been involved for certain years.[42] Similarly, if a suit arises to resolve the allocation of insurance liability, any insurance company can try to prove that there was no inhalation of Keene's asbestos during or before its policy period. If an insurance company does so, then that company will be free of liability.

III. Liberty's 1967-68 Policy

The district court included Liberty's 1967-68 policy among the policies that potentially cover Keene's liability for asbestos-related injury.[43] Liberty argues that the policy does not cover Keene's liability for injuries caused by the products of its former subsidiary Baldwin-Ehret-Hill. In opposition to Keene's motion for summary judgment, Liberty submitted affidavits to support its position. Liberty also argues that if the policies did cover Baldwin-Ehret-Hill, that facet of their coverage was conveyed to Gale Corporation when Keene sold Baldwin-Ehret-Hill to Gale.[44] Keene responds by arguing that Endorsement No. 1 of the policy provides for coverage of any subsidiary in which Keene owned more than a fifty-percent interest.[45]

In February 1968, Keene acquired more than fifty percent of Baldwin-Ehret-Hill's stock. Therefore, Keene argues, Baldwin-Ehret-Hill was covered by Liberty's policy.

We hold that there was before the district court a genuine issue of material fact on this point. Therefore, the district court erred in including the issue in its summary judgment order.

Conclusion

In view of the above, we reverse the district court's order of summary judgment. The district court should enter a judgment and institute further proceedings consistent with this opinion.

So ordered.

Appendix A: Variations in Policy Language

Insurer	Policy Period	Indemnification Provision	Defense Provision	Definitions	Policy Period Territory
INA	12/31/61-12/31/64	To pay on behalf of the insured . . . damages because of bodily injury . . . arising out of . . . all . . . operations (other than automobile) of the insured	[T]he company shall . . . defend any suit against the insured alleging such injury . . . even if such suit is groundless, false or fraudulent	The words "bodily injury" . . . mean bodily injury, sickness, disease	This policy applies only to occurrences or accidents which take place during the policy period
	1/1/65-1/1/68	Same	Same	Same	Same
	1/1/68-8/23/68	INA will pay on behalf of the Insured . . . damages because of personal injury . . . to which this insurance applies, caused by an occurrence	INA shall have the right and duty to defend any suit against the Insured seeking damage on account of such personal injury . . . even if any of the allegations of the suit are groundless, false or fraudulent	[P]ersonal injury means . . . bodily injury, disability "[B]odily injury" means bodily injury, sickness or disease sustained by any person (Definition of "occurrence" applies only to property damage)	This insurance applies only to personal injury . . . which occurs during the policy period

* All policy provisions are taken from the 1/1/65-1/1/68 policy.

Insurer	Policy Period	Indemnification Provision	Defense Provision	Definitions	Policy Period Territory
Liberty Mutual	8/23/67-8/23/68	The company will pay on behalf of the insured . . . damages because of . . . bodily injury . . . to which this policy applies, caused by an occurrence	[T]he company shall have the right and duty to defend any suit against the insured seeking damages on account of such bodily injury . . . even if any of the allegations of the suit are groundless, false or fraudulent	"[B]odily injury" means bodily injury, sickness or disease. . . which occurs during the policy period "[O]ccurrence" means an accident, including continuous or repeated exposure to conditions which results in bodily injury	Not relevant
Aetna	8/23/68-8/23/71	The company will pay on behalf of the insured . . . damages because of bodily injury . . . to which this insurance applies, caused by an occurrence	[T]he company shall have the right and duty to defend any suit against the insured seeking damages on account of such bodily injury . . . even if any of the allegations of the suit are groundless, false or fraudulent	"[B]odily injury" means bodily injury, sickness or disease "[O]ccurrence" means an accident, including injurious exposure to conditions, which results, during the policy period, in bodily injury	This insurance applies only to bodily injury . . . which occurs during the policy period

* All policy provisions are taken from the 10/1/74-10/1/75 policy.

Insurer	Policy Period	Indemnification Provision	Defense Provision	Definitions	Policy Period Territory
Hartford	8/23/71-8/23/72	The company will pay on behalf of the insured. . . damages because of. . . bodily injury. . . to which this insurance applies, caused by an occurrence	[T]he company shall have the right and duty to defend any suit against the insured seeking damages on account of such bodily injury. . . even if any of the allegations of the suit are groundless, false or fraudulent	"[B]odily injury" means bodily injury, sickness or disease "[O]ccurrence" means an event including injurious exposure to conditions which result, during the policy period in bodily injury	This insurance applies only to bodily injury. . . which occurs during the policy period
	8/23/72-8/23/73	Same	Same	Same	Same
	8/23/73-10/1/74	Same	Same	"[B]odily injury" means bodily injury, sickness or disease. . . which occurs during the policy period	Same

Insurer	Policy Period	Indemnification Provision	Defense Provision	Definitions	Policy Period Territory
Hartford (Con't.)				"[O]ccurrence" means an event including injurious exposure to conditions which result, during the policy period in bodily injury	
Liberty Mutual	10/1/74-10/1/75	The company will pay on behalf of the insured . . . damages because of . . . bodily injury . . . to which this policy applies, caused by an occurrence	[T]he company shall have the right and duty to defend any suit against the insured seeking damages on account of such bodily injury . . . even if any of the allegations of the suit are groundless, false or fraudulent	"[B]odily injury" means bodily injury, sickness, or disease . . . which occurs during the policy period "[O]ccurrence" means an accident, including continuous or repeated exposure to conditions which results in bodily injury	Not relevant
	10/1/75-10/1/76	Same	Same	Same	Same

Insurer	Policy Period	Indemnification Provision	Defense Provision	Definitions	Policy Period Territory
Liberty Mutual (Con't.)	10/1/76-10/1/77	The company will pay on behalf of the insured . . . damages *because of* . . . personal injury* . . . to which this policy applies, caused by an occurrence	[T]he company shall have the right and duty to defend any suit against the insured seeking damages on account of such personal injury . . . even if any of the allegations of the suit are groundless, false or fraudulent	"Personal injury" means . . . bodily injury "[B]odily injury" means bodily injury, sickness or disease . . . which occurs during the policy period "[O]ccurrence" [as amended] means . . . exposure to conditions which results in "bodily injury" . . . neither expected nor intended from standpoint of the "insured"	Not relevant
Liberty Mutual	10/1/77-10/1/78	Same	Same	Same	Same
	10/1/78-10/1/79	Same	Same	Same	Same
	10/1/79-10/1/80	Same	Same	Same	Same

* The term "personal injury" was substituted, by endorsement, for bodily injury.

Footnotes—App. A

[1] Keene Corporation was formed in 1967 and subsequently purchased most of the stock of Baldwin-Ehret-Hill, Inc. In 1968, Baldwin-Ehret-Hill became a subsidiary of Keene, and in 1970 it was merged into Keene Building Products Corporation, another Keene subsidiary. All corporations sold thermal insulation products that contained asbestos. Keen's brief at 5-6. All corporations will be referred to as "Keene" for simplicity.

[2] Under Borel V. Fibreboard Paper Prods., 493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974), an asbestos manufacturer such as Keene can be held jointly and severally liable for asbestos-related diseases that were caused, in part, by its products.

[3] Asbestosis is a fibrous condition of the lungs, which is caused by asbestos fibers reaching the alveoli. Once begun, the condition progresses without additional inhalation of asbestos, but it becomes even more serious if inhalation continues. The seriousness of the disease in individual cases depends on the duration and intensity of inhalation and on individual idiosyncrosy. *See* Selikoff, Bader, Bader, Churg, and Hammond, *Asbestosis and Neoplasia*, 42 AM. J. MED. 487 (1967); Selikoff, Churg, and Hammond, *The Occurrence of Asbestosis Among Insulation Workers*, 132 ANN. NEW YORK ACAD. SCI. 139 (1965). For a brief discussion of asbestosis, *see* Borel v. Fibreboard Paper Products Corp., *supra* note 2.

Mesothelioma is a malignant tumor of the lining of the lungs or the lining of the peritoneum, which surrounds the organs of the gastrointestinal tract. It is well-established that prolonged inhalation of asbestos fibers causes mesothelioma. The disease can develop many years after inhalation ceases, and can manifest itself several months after it begins to develop.

Lung cancer, or bronchogenic carcinoma, is also generally thought to be caused by prolonged inhalation of asbestos. It too can develop and manifest itself long after inhalation ceases.

The details of the development of these diseases are not relevant to the issues decided below. The only relevant facts are that the diseases develop long after exposure to Keene's products, and that Keene can be held liable for their occurrence.

[4] From August 8, 1967 through August 23, 1968, both INA and Liberty insured Keene. Liberty argues that its 1967-68 policy does not cover Keene's liability for asbestos-related disease. That issue, which the district court decided against Liberty, is addressed in Part III below.

[5] J.A. at 1028-29. From November 1, 1948 through November 1, 1959, Pennsylvania Manufacturers' Association Insurance Co. insured Keene. Whether its policies covered products liability is in dispute in another case. *See* Keene Corp. v. Pennsylvania Manufacturers' Association Insurance Co., Civ. No. 78-1011 (D.D.C. Jan. 30, 1981), *appeal docketed,* No. 81-1248 (D.C.Cir. Mar. 5, 1981).

[6] For a summary of the differences in coverage language amount of the policies, *see* Appendix A (reproduced from J.A. III at 1031-35. All of the policies are reproduced at J.A. I at 17-245, J.A. II at 537-832, J.A. III at 1036-1202, J.A. IV at 1203-1509). We hold that none of the differences in the policies' language warrants different interpretations in this case.

[7] *See* note 4 *supra.*

[8] Insurance coverage issues are commonly resolved in declaratory judgment actions. *See* WRIGHT & MILLER, *supra,* at 2760.

[9] The district court found that 15 or 20 years can pass following an initial inhalation before asbestosis manifests itself. Longer periods of time can pass before mesothelioma or lung cancer manifest themselves. Memorandum op. at 3 (J.A. IX at 3533). *Accord,* Selikoff, Churg, & Hammond, *supra* note 3.

[10] Jurisdiction in this case exists under 28 U.S.C. § 1332 (1976) by virtue of the diversity of citizenship between the plaintiffs and each of the defendants. We find it unnecessary, however, to reach the issue of the applicable state law. The district court did not address the issue, nor did any of the parties raise the issue. This omission is apparently due to the fact that the potentially applicable state laws do not differ from one another.

Keene is incorporated in Delaware, has its principal place of business in New York, and is licensed to do business in the District of Columbia. Each of the defendants is also licensed to do business in the District of Columbia. INA is incorporated in Pennsylvania and has its principal place of business in Pennsylvania. Aetna is incorporated in Connecticut and has its principal place of business in Pennsylvania. Hartford is also incorporated in Connecticut and has its principal place of business in Connecticut. And Liberty is incorporated in Massachusetts and has its principal place of business in Massachusetts. None of the laws of these states gives us specific guidance in resolving this case, and the basic principles governing the interpretation of insurance policies are the same in each state. There is thus no conflict of laws. There is what some have termed a "false conflict." *See, e.g.,* R. LEFLAR, AMERICAN CONFLICTS OF LAW 188 (3d ed. 1977); Comment, *Flase Conflicts,* 55 CALIF. L.REV. 74, 113 (1967). Therefore, we need not engage in the exercise of identifying which jurisdiction's law governs. *See* Waters v. American Automobile Ins. Co. 363 F.2d 684, 687 (D.C.Cir. 1966); Williams v. Rawlings Truck Line, Inc., 357 F.2d 581, 585 (D.C.Cir. 1965).

[11] *See* TAN 37, 38 *infra.*

[12] Professor (now Judge) Keeton has suggested that the legal doctrines governing the construction of insurance contracts fit together under a more general, frequently unstated, principle that can be summarized as follows:

> The objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations.

Keeton, *Insurance Law Rights at Variance with Policy Provisions,* 83 Harv. L.Rev. 961, 967 (1970). Professor Keeton argues that the principle is appropriate in view of the fact that an insurance policy is a contract of adhesion. *Id.* As applied to this case, we agree with Judge Keeton and explicitly base our interpretation of these policies on the reasonable expectations of Keene.

[13] Keene's brief at 18.

[14] *Id.*

[15] Hartford also argues that the extent of an insurer's liability is limited by the proportion of exposure that occurred in its policy period, whereas Keene argues that, once an insuerer's policy is triggered, the insurer is liable for the full loss. *See* TAN 26.

[16] The Fifth Circuit also followed that case in Porter v. American Optical Corp., 641 F.2d 1128 (5th Cir. 1981). In Insurance Co. of N. America v. Forty-Eight Insulations, 633 F.2d 1212 (6th Cir. 1980), *aff'd on rehearing,* Nos. 78-1322-1326 (Mar. 9, 1981), the issue of allocating indemnification expenses was not before the court. The district court in that case held that both defense and indemnification costs should be apportioned among the insurers and the insured on a pro-rata basis. Insurance Co. of N. America v. Forty-Eight Insulations, 451 F.Supp. 1230 (E.D.Mich. 1978). The insured, however, only appealed the issue of apportioning defense costs to itself. The Sixth Circuit held that the defense costs should be apportioned on the same basis that the district court used to apportion indemnification costs. In *Porter,* it is unclear whether

that court held that the insured must bear a pro-rata share of indemnification and defense costs.

For reasons discussed throughout this opinion, however, we decline to adopt the approach taken in those cases.

[17] Workmen's compensation cases are only minimally instructive in construing comprehensive general liability policies. Those cases, only some of which adopt the manifestation approach, rely largely on the legislative intent behind workmen's compensation statutes. *See* General Dynamics Corp. v. Benefits Review Board, 565 F.2d 208, 212 (2d Cir. 1977); Travelers Insurance Co. v. Cardillo, 225 F.2d 137, 145 (2d Cir.), *cert. denied*, 350 U.S. 913 (1955). The cases that adopt the manifestation approach are based on "the overriding importance of efficient administration" in the workmen's compensation system. *Cardillo, supra*, 225 F.2d at 145. Although administrative feasibility must be one of our concerns in this case, it is not so "overriding" that we would be willing to accept the consequences that it would imply for the contracts before us.

Statute of limitations cases are not at all relevant. The date that a disease is deemed to occur for purposes of statutes of limitations is generally the date of manifestation. *E.g.*, United States v. Kubrick, 444 U.S. 111 (1979). If the date of a disease's origin were to begin statute of limitations periods, meritorious claims would be barred. As a matter of policy, courts have held that the purpose of the statutes of limitations—to protect defendants against stale claims—does not warrant barring such claims. *See, e.g., id.* at 117; Urie v. Thompson, 337 U.S. 163, 169-71 (1949). The considerations involved in those cases have no bearing on the considerations relevant to this case.

The health insurance cases are more relevant to this case. The only problem in those cases, however, is to determine when a disease begins in order to decide whether it began during a

policy period. The cases hold that if a disease manifests itself during a policy period, then that policy covers the disease even if the origin of the disease can be traced back to a point in time prior to the policy period. *See, e.g.*, Wilkins v. Grays Harbor Community Hospital, 427 P.2d 716 (Wash. 1967); Reiser v. Metropolitan Life Insurance Co., 262 App.Div. 171, 28 N.Y.S.2d 283 (1941). In those cases, the security that the policies provided would be undermined if a disease were *not* covered by the insurer on the risk at the time the disease manifests itself.

The court in *Forty-Eight, supra* note 16, expressed a similar opinion concerning the relevance of cases in these areas of the law. 633 F.2d at 1220-22.

[18] This seems to be Hartford's theory. Hartford does not suggest that exposure in residence should trigger coverage.

[19] This would not be true of Keene's characterization of asbestos-related diseases as a series of discrete injuries beginning with inhalation exposure and continuing throughout the development of the disease. That characterization would imply the same conclusion that we reach, although perhaps not when Keene is held jointly and severally liable with other manufacturers. *See* note 20 *infra*. Such a characterization is, however, unnecessarily fact-bound. If a disease could be predicted to develop many years after inhalation of asbestos, yet no cellular changes were known to occur during that period, we would still hold that all policies are triggered from the point of exposure through the point of manifestation. In addition, by beginning with that characterization of the disease, Keene fails to develop the proper rationale for the result it seeks.

[20] The characterization of each exposure as a discrete injury must be rejected for yet another reason. In Borel v. Fibreboard Paper Prods., *supra* note 2., the court held that an asbestos-product manufacturer can be held jointly and severally liable for asbestos-related disease as long as its products had

some causal relationship to the development of the disease. That means that a person who used Keene's products for one year, for instance, and then used other manufacturers' asbestos-containing products for several years, could recover damages from Keene for his total loss. If each exposure is considered a separate "injury," under the terms of the policies, one might be able to argue that each insurer is responsible only for the "injuries" that occurred during its policy periods, even though Keene, in effect, would be liable for "injuries" that occurred outside those policy periods, as a result of exposure to other manufacturers' products. It is unclear whether that is the holding in *Forty-Eight, supra* note 16, 633 F.2d at 1225, or whether that is Hartford's argument. It is clear, however, that such a result would be contrary to the terms of the insurance policies, which explicitly state that the insurer will pay "all sums which the insured shall become legally obligated to pay as damages because of bodily injury [during the policy period]." As long as there was either inhalation exposure or exposure in residence during a policy period, and as long as Keene must pay damages as a result, the insurer must indemnify Keene for whatever damages it must pay. That must be true even if Keene is obligated to pay for injury that may have occurred, in part, as a result of exposure to other manufacturers' products. To that extent, the terms of the policies incorporate evolving tort doctrines. The allocation of liability among Keene's insurers is addressed in section II-C, below.

Thus, rather than engaging in further heuristic constructs to avoid this inappropriate result, we have approached this problem in a straightforward manner that avoids the problem from the outset. We treat the diseases at issue in this case as single injuries that occur over extended periods of time.

[21] Beginning in 1976, Liberty began using large deductibles and administrative fees for handling asbestos-damage claims. Keene Corp. v. Insurance Co. of N. America, Civ. 78-1011 (D.D.C. Jan. 30, 1981), Memorandum op. p.2 n.2, p.6 (J.A. IX at 3532, 3536).

[22] Although asbestosis has been known to man since the early 1900s, *see* note 25 *infra*, the general danger of prolonged exposure to asbestos fibers was not fully recognized until the late 1960s or early 1970s. *See* Insurance Co. of N. America v. Forty-Eight Insulations, *supra* note 16 at 1215. Keene stopped using asbestos in its products at about that time. Memorandum op. p. 1 (J.A. IX at 3531).

[23] *See* TAN 20 *supra*.

[24] The other circuits that have considered this manifestation theory in the context of asbestos-related disease have also rejected the theory. *See* Porter v. American Optical Corp., *supra* note 16; Insurance Co. of No. America v. Forty-Eight Insulations, Inc., *supra* note 16.

[25] Theoretically, it would be possible to preserve Keene's rights under the policies if coverage were triggered at the point at which the dangers of asbestos inhalation were discovered. Such an interpretation, however, is not compelled by the terms of the policies and would be impossible to implement.

[26] Apparently, the formula Hartford would propose is the following:

$$\text{Insurance company X's pro-rata share} = \frac{\text{number of years of exposure to Keene's products during company X's policy period}}{\text{Total number of years of exposure}} \times \text{Keene's total liability}$$

But see note 20 *supra*. Hartford argues that only inhalation exposure should be taken into account in prorating liability.

[27] *See* TAN 20 & n.20 *supra*.

[28] *See* TAN 20 and 23 supra.

The possibility of injury as a result of prolonged exposure to a substance was not unknown at the time these policies were issued. Cases of asbestosis were reported among asbestos textile workers early in the twentieth century, and by the 1930s

it was well recognized that prolonged exposure to asbestos causes the disease. *See* Borel v. Fibreboard Paper Products Corp., *supra* note 2. *See generally* Selikoff, Churg, and Hammond, *supra* note 3 (discussion of asbestosis). Moreover, most of the policies explicitly recognize continuous exposure to certain conditions as an occurrence that can result in injury. Yet none of the policies provided that the insurer's liability would be limited in any way when exposure extends over several policy periods. The absence of such a provision supports our view that Keene could have reasonably expected complete security from each policy that it purchased.

[29] *See* TAN 20 and 23 *supra*.

[30] As Judge Wald points out, concurring op. at n.7, this interpretation of the policies provides the basis of our entire decision. She is correct in pointing out that it is an "indispensible initial premise of the liability theory[that we espouse]." *Id.* We rest our interpretation on the terms and principles of the insurance policies in issue. *See* TAN 20 and 23 *supra*. Judge Wald's reliance on fairness in support of an alternative—but unstated—basic premise is appealing. *Id.* However, the contracts at issue in this case do not warrant such an independent appeal to fairness as a basis for deciding to allocate liability among all of the parties. At the same time, we see nothing unfair in holding that Keene is fully covered by each of the policies that it purchased.

[30] The Sixth Circuit made the same point in Insurance Co. of N. America v. Forty-Eight Insulations, *supra* note 16, at 1225.

[31] This omission is particularly significant in the policies that explicitly recognize the possibility that injury can be caused by prolonged exposure to certain conditions. *See* note 28 *supra*.

[32] We recognize, however, that there is not a linear relationship between the number of years of coverage the the number of injuries that can be expected to be covered.

[33] *See* TAN 33 *infra.*

[34] We are further supported in our conclusion by the fact that Keene could be held fully liable for an asbestos-related injury even if a plaintiff's exposure to Keene's products was minimal compared to his or her exposure to other manufacturer's products. *See Borel, supra* note 2. If Keene were held fully liable under such circumstances, there would be no question but that whatever insurer was on the risk at that time could be held fully liable to Keene. Given that, it does not require too great a leap of logic to hold fully liable any insurer whose policy covers a particular injury. We need not confront the issue of an insurer's obligation if an injury for which the insured can be held liable is not indivisible as the diseases at issue in this case are.

[35] *Eg.,*

(a) Contribution by Equal Shares. If all of such other valid and collectible insurance provides for contribution by equal shares, INA shall not be liable for a greater proportion of such loss than would be payable if each insurer contributes an equal share until the share of each insurer equals the lowest applicable limit of liability under any one policy or the full amount of the loss is paid, and with respect to any amount of loss not so paid the remaining insurers then continue to contribute equal shares of the remaining amount of the loss until each insurer has paid its limit in full or the full amount of the loss is paid.

(b) Contribution by Limits. If any of such other insurance does not provide for contribution by equal shares, INA shall not be liable for a greater proportion of such loss than the applicable limit of liability under this policy for such loss bears to the total applicable limit of liability of all valid and collectible insurance against such loss.

J.A. II at 551.

In addition, nothing we hold today bars insurers from collecting from one another under the doctrine of contribution.

[36] The procedure by which this duty can be enforced is discussed in section E, below.

[37] Nothing we now hold should be read to prevent an insurer from sharing the costs of defense with other insurers under the "other insurance" clauses or under the doctrine of contribution.

[38] The construction that we adopt today should lead to far less complex tort suits than the district court's construction would have provoked. If each insurer and Keene had to bear pro-rata shares of total damage awards, all of them would have to join the other defendants (and their insurers) in each tort suit. Each suit would thus become an unwieldy spectacle. Within the plaintiff's suit for damages, groups of defendants would pursue disputes with each other. That result, which is not required by the contracts, would impose unnecessarily high costs on all parties—particularly the victim, who should not have to bear any of the cost of a dispute among Keene's insurers or between Keene and its insurers. We expect that these suits will be litigated more efficiently under the liability scheme we set forth today.

It should also be noted that we are not requiring that the company that defends Keene must also be the company whose policy limits determine the extent to which Keene may be indemnified. *See* TAN 34 *supra*.

[39] This would also be true of other underlying tort doctrines such as enterprise liability, *e.g.*, Hall v. E.I. du Pont de Nemours, 345 F.Supp. 353 (E.D.N.Y. 1972), or market share liability, *e.g.*, Sindell v. Abbot Laboratories, 26 Cal.3d 588, 607 P.2d 924, 163 Cal.Rptr. 132 (1980), *cert. denied*, 101 S.Ct. 286 (1980). *See generally*, Comment, 57 N.D.L. REV. 81 (1981).

[40] *See* Comment, *Liability Insurance for Insidious Disease: Who Picks Up the Tab?*, 48 FORDHAM L.REV. 657, 691-92.

[41] Preferably this would be done by affidavit or deposition.

[42] We recognize that the insured generally bears the burden of proving coverage. The injuries at issue in these cases, however, are unique and traditional procedural rules cannot be allowed to defeat Keene's or its insurers' substantive rights under the policies. Reversal of the ordinary burden of proof will be more equitable for all parties and will prevent unnecessary litigation. The Sixth Circuit, in Insurance Co. of N. America v. Forty-Eight Insulation, *supra* note 16, also set out this procedure for litigating multiple-defendant suits for asbestos related disease.

[43] Memorandum op. at 3 (J.A. IX at 3532).

[44] Liberty's brief at 63-65.

[45] Keene's reply brief at 27-28. Endorsement No. 1 reads as follows:

> [t]he term named insured includes in addition to the person or corporation named in Item 1 of the declarations any business entity . . . while the person or organization named in Item 1 of the declarations . . . owns, during the policy period, an interest in such entity of more than fifty-percent (50%).

J.A. III at 1047.

APPENDIX B

United States Court of Appeals
Filed October 1, 1981
George A. Fisher, Clerk

UNITED STATES COURT OF APPEALS
For The District of Columbia Circuit

No. 81-1248 September Term, 1980

Keene Corporation,
Appellant Civil Action

v. No. 78-01011

Insurance Company of North America, et al.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Before: BAZELON, Circuit Judge; WILKEY and WALD, Circuit Judges

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. On consideration of the foregoing, it is

ORDERED AND ADJUDGED by this Court that the case is remanded to the District Court for further proceedings consistent with the attached memorandum. If no further proceeding is so required, the judgment is affirmed.

Per Curiam
For the Court
/s/ George A. Fisher
George A. Fisher
Clerk

MEMORANDUM

The district court granted Pennsylvania Manufacturers' Association Insurance Company's (PMA) motion for summary judgment after analyzing the policies and hearing two days of testimony. It appears from the record that the parties presented all available evidence to the district court. On the basis of the policies and supporting evidence, the court found that the absence of products hazard coverage is not an exclusion from coverage for purposes of burdens of proof. Therefore, the court found that Keene failed to make out a prima facie case. Presumably, if Keene had produced even indirect evidence that it was covered by PMA for products liability, the court would not have so held. Keene, however, not only failed to produce copies of its own policies, but failed to produce any other evidence that it had purchased products hazard coverage from 1948 to 1959.

If the factual record before us is complete, we affirm the district court's judgment. If, however, Keene has additional evidence to present that would tend to show that it had products coverage under the PMA policies, then it should be permitted to do so. If that is done, we direct the district court to make any necessary findings of fact and conclusions of law with all possible dispatch.

Wald, *Circuit Judge,* concurring in part:

This is a case of first impression and, irrespective of how it is resolved, requires a "leap of logic," maj. op. n. 34, from existing precedent, for it concerns diseases about which there is no medical certainty as to precisely how or when they "occur." We do know the prerequisite—exposure to asbestos fibers—and the symptoms that manifest themselves, generally too late for effective treatment. What happens in between is still something of a mystery; why does one exposed person fall victim to the diseases while another does not? This suit is one of

several filed in different courts to ascertain the liability of insurers of manufacturing companies when those companies are sued by asbestosis, mesothelioma and lung cancer victims who have been exposed to the companies' products. Two circuits, the Fifth[1] and Sixth,[2] have determined that exposure alone should trigger the insurer's liability.[3] The Sixth Circuit has also determined that the judgment awarded to the victim should be allocated among insurance companies pro rata according to their share of the total risk period during which the manufacturer insured. If the risk period includes years when the manufacturer was uninsured (or self-insured), the manufacturer must bear a proportional share of the judgment.[4]

The approach taken in the panel opinion here is different from the approaches of other courts in two significant respects. First, it defines the "injury" that triggers insurance coverage not merely as exposure to asbestos fibers or manifestations of the symptoms of asbestosis, mesothelioma or lung cancer, but also—at least in the case of asbestosis—as the process by which the victim's body resists, adapts, and tries to accommodate itself to a foreign matter—a process, which we understand from the medical testimony elicited at trial, is a major, if not primary, factor in the development of asbestosis. In short, the "injury" is taking place every year that the asbestos fiber remains *in situs* until tissue damage in the lungs is significant enough to be detected by X-rays or to produce symptomatic effects of asbestosis, mesothelioma or lung cancer. *See* maj. op. at n.3. I *agree* with this more comprehensive definition of "injury," encompassing the period from initial exposure to manifestation, because it comports with what we know and do not know about the etiology and progress of the diseases. This process-oriented definition not only provides a flexible formula for adjudicating the legal issues associated with asbestos-related diseases, but also sets a useful precedent for other product-exposure injuries, as of yet unknown in origin. Further, the more comprehensive definition will give much needed certainty to the insurance

industry, currently rent asunder by advocates of exposure and manifestation, whose fluctuating positions often depend upon their economic interests in a particular case, and by differing judicial rulings which seem to depend at least partially upon the equities of each case.

Second, the majority opinion exempts asbestos manufacturers from all financial responsibility arising from a suit if the manufacturer had purchased insurance which covered any part of the injury period.[5] I am not able to agree with this aspect of the majority opinion, as it applies to the period *prior* to the time when such coverage could no longer be obtained.[6] I just do not understand why an asbestos manufacturer, which has consciously decided not to insure itself during particular years of the exposure-manifestation period, should have a reasonable expectation that it would be exempt from any liability for injuries that were occurring during the uninsured period. It seems to me logical and fair[7]—as it seemed to the Sixth Circuit and to the trial court here—to distribute the ultimate financial responsibility on a pro rata basis among the various insurance companies on line during the risk period, and to include Keene as a self-insurer for the years when it failed to take out any insurance. This position, advocated by the Hartford Accident and Indemnity Company, is not, as the panel opinion says, maj. op. at ____, based upon a conceptualization of asbestos-related diseases as a multitude of discreet injuries to the victim. Rather, it is based upon the very notion of "injury" adopted by the panel. If asbestos-related diseases are understood as progressive or cumulative, then all those who voluntarily assumed risk during the period when the diseases progressed must share the responsibility for the judgment and this includes self-insurers. If the risk is to be shared only by the insurance companies, a manufacturing company that purchased insurance intermittently during the risk period would be as secure as those prudent companies that continually purchased insurance.

Subject to this concern, I concur with the majority opinion.

Footnotes—App. B

[1] Porter v. American Optical Corp., No. 78-1953 (5th Cir. April 8, 1981) [hereinafter *Porter*].

[2] Insurance Co. of North America v. Forty-Eight Insulations, Inc., 633 F.2d 1212 (6th Cir. 1980), *aff'd on rehearing*, Nos. 78-1322-1236 (Mar. 9, 1981).

[3] The United States District Court for the District of Massachusetts however, determined that manifestation triggered coverage. Eagle Picher Industries, Inc. v. Liberty Mutual Insurance Company, et al., Civil Action No. 78-2739-2 (D. Mass. August 14, 1981).

[4] The Fifth Circuit was not forced to resolve the question of whether the insured ought to be included within the pro rata distribution of liability. *Porter*, 641 F.2d at 1145.

[5] However, if liability exceeds the liability limit of the policy, then the majority would hold the manufacturer liable for the amount exceeding the limit.

[6] I agree, however, that the manufacturer may target one insurance company to defend the suit and that if judgment is awarded for the victim, the targeted insurance company must pay the victim to the extent of coverage and then seek contribution from other on-line insurers. I disagree only to the extent that self-insurers are excluded from contributing.

[7] The majority finds my position "problematic," but that is only because I have not made as long a "leap of logic" as it. Thus, I do not think that "Keene's rights [to be free of all liability] under the policies viewed in their entirety," are so much the product of a "logically prior determination," maj. op. at ____, as they are the indispensible initial premises of the liability theory espoused in the opinion. Since I can find no first premises in the terms of the policies and canons of interpreting insurance policies, I must seek my own first premises in notions of fairness rather than in principles of logic. I cannot agree that

it is fair to exempt self-insurers under these circumstances. I recognize the problems of working out the terms of a "self-insurance policy," but we should expect difficulties when we forge new ground. Certainly the majority's position entails its own share of implementation problems.

Opposition

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No. 81-200

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

AETNA CASUALTY AND SURETY COMPANY,
Petitioner,

v.

CHARLES J. PORTER, AMERICAN OPTICAL CORPORATION, HARTFORD ACCIDENT & INDEMNITY COMPANY, CONTINENTAL INSURANCE COMPANY AND AMERICAN MOTORISTS INSURANCE COMPANY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF IN OPPOSITION OF RESPONDENT HARTFORD ACCIDENT & INDEMNITY COMPANY

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IN THE

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AETNA CASUALTY AND SURETY COMPANY,
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CHARLES J. PORTER, AMERICAN OPTICAL CORPORATION, HARTFORD ACCIDENT & INDEMNITY COMPANY, CONTINENTAL INSURANCE COMPANY AND AMERICAN MOTORISTS INSURANCE COMPANY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF IN OPPOSITION OF RESPONDENT HARTFORD ACCIDENT & INDEMNITY COMPANY

Petitioner Aetna Casualty and Surety Company (hereinafter "Petitioner") has asked this Court to issue a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered on April 8, 1981 and reported at 641 F.2d 1128.[1] Respondent Hartford Accident &

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[1] This opinion is also reprinted at p. 16 of the Appendix ("App.") to the instant Petition for a Writ of Certiorari ("Pet.").

Indemnity Company (hereinafter "Hartford") urges this Court to deny the instant Petition.

STATEMENT OF THE CASE

This is a diversity action, involving issues of Louisiana law with respect to products liability and insurance coverage. In its decision of April 8, 1981, the Court of Appeals affirmed a jury determination that American Optical Corporation was liable for damages, resulting from asbestosis contracted by Charles J. Porter, due to a defective respirator and filter apparatus supplied by American Optical Corporation. The Court of Appeals further held that insurance liability for a cumulative disease such as asbestosis should be apportioned on a *pro rata* basis among the insurers during the period of injurious exposure to asbestos. It is this latter holding of the Court of Appeals which is the subject of the instant petition before this Court.

Petitioner Aetna Casualty and Surety Company provided liability insurance coverage for American Optical Corporation from 1954 until January 1971. Aetna's coverage period covered the first years of Porter's exposure to asbestos particles but ended prior to Porter's hospitalization, or outward manifestation of asbestosis symptoms. Pet. App. 27b. Respondent Hartford provided similar coverage from January 1, 1971 through January 1, 1975. Hartford's coverage period covered the last several years of Porter's exposure to asbestos particles and the outward manifestation of asbestosis symptoms, but ended prior to formal diagnosis of asbestosis. Pet. App. 27b. Continental Insurance Company provided coverage from January 1, 1975 to January 1, 1978. During Continental's coverage period, asbestosis was first diagnosed, but no fur-

ther exposure to asbestos took place because Porter was retired during the entire policy period. Pet. App. 27b.

The various insurance policies purchased by American Optical generally covered damages because of "bodily injury" caused by an "occurrence." Pet. App. 32b. Bodily injury was defined to mean "bodily injury, sickness or disease". Pet. App. 32b. Petitioner Aetna argued in the court below that "bodily injury" meant *manifestation* of injury, sickness, or disease. Respondent Hartford, on the other hand, contended, based on the medical evidence in the record, that "bodily injury" within the meaning of the pertinent insurance policies occurred whenever asbestos fibers were inhaled or ingested in Porter's lungs. Insurance coverage should be available whenever competent medical evidence demonstrates that "bodily injury" has occurred within the policy period.

The Court of Appeals agreed with Hartford and adopted the "injurious exposure" theory. The Court of Appeals noted that "there was medical evidence that each introduction of fibers into Porter's lungs was 'bodily injury', cumulatively and progressively more harmful to the victim." Pet. App. 30b. In reaching this result, the Court of Appeals expressed its agreement with the reasoning and result in the recent Sixth Circuit opinion on this precise issue in *Insurance Co. of North America* v. *Forty-Eight Insulations, Inc.*, 633 F.2d 1212 (6th Cir. 1980), *petitions for cert. filed*, 50 U.S.L.W. 3023 (U.S. July 31, 1981) (Nos. 81-198 and 81-199) The Court of Appeals then ordered that both Petitioner Aetna and Respondent Hartford bear a *pro rata* share of the costs of the liability, based upon the

proportion of Porter's injurious exposure period which coincided with their respective policy periods.

SUMMARY OF ARGUMENT

This case presents solely a question of state law which this Court ordinarily declines to review. The considered determination of state law by the Court of Appeals, where there were no state precedents directly on point, fully satisfied the rule of *Erie R. Co.* v. *Tomkins,* 304 U.S. 64 (1938). No other constitutional or federal question is present.

This diversity case involving the narrow issue of state law construction of the term "bodily injury" in an insurance policy does not present any exceptional circumstances which justify review. This decision of the Fifth Circuit is in full accordance with the Sixth Circuit, the only other circuit which has considered this issue. Review by this Court would not have nationwide significance because the Court's review would apply only to the law of the State of Louisiana. Petitioner's allegations concerning the potential impact of the ruling on judicial administration of other asbestos cases is sheer speculation and does not rise to the level of exceptional circumstances which justify review.

Moreover, the Court of Appeals correctly ruled that the language of the insurance policies and the medical evidence supported the conclusion that insurance coverage for asbestos-related claims is governed by injurious exposure to asbestos, not by ultimate manifestation or diagnosis many years later of asbestos-related disease.

Petitioner's contention concerning a purported reversal of the burden of proof is not properly before this Court because Petitioner concedes that there was

no burden of proof issue in this case. Accordingly, this Court should decline review of this hypothetical question in this case. However, that issue is before the Court on petitions for certiorari in *Insurance Co. of North America* v. *Forty-Eight Insulations, Inc.*, 50 U.S.L.W. 3023 (U.S. July 31, 1981) (Nos. 81-198 and 81-199) and Hartford has sought permission to address it as an *amicus* in that case.

REASONS FOR DENYING THE WRIT

1. This case presents solely issues of state law upon which this Court ordinarily defers to the decision of the Court of Appeals. *Pierson* v. *Ray*, 386 U.S. 547, 558 n. 12 (1967); *Huddleston* v. *Dwyer*, 322 U.S. 232, 237 (1944). Moreover, Petitioner's contention that the Fifth Circuit ignored Louisiana law when the court found persuasive the reasoning and result of the Sixth Circuit's decision of the identical issue[2] is belied by the plain language of the Fifth Circuit's opinion. Even Petitioner admits that the Court of Appeals expressly stated that Louisiana law controlled the interpretation of the insurance policies here at issue. Pet. at 16; 641 F.2d at 1145.

Petitioner's real contention is that "the Court of Appeals did not refer to a single Louisiana opinion regarding insurance coverage." Pet. at 16. However, the Court of Appeals cited no less than *four* Louisiana cases for the proposition that "insurance policies are to be construed and interpreted the same as other contracts and written agreements." Pet. App. 31b-32b.

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[2] Insurance Co. of North America v. Forty-Eight Insulations, Inc., 633 F.2d 1212 (6th Cir. 1980), *petitions for cert. filed*, 50 U.S.L.W. 3023 (U.S. July 31, 1981) (Nos. 81-198 and 81-199).

Moreover, the inability of the Court of Appeals to cite a Louisiana case precisely on point is neither unusual nor surprising where as here there are *no* Louisiana insurance cases construing the specific policy language "bodily injury" in the context of a cumulative disease such as asbestosis. Indeed, the Fifth Circuit expressly recognized "the novelty of the issues presented with reference to insurance coverage." Pet. App. 2b; 641 F.2d at 1130. With no Louisiana cases on point, the Fifth Circuit correctly construed the pertinent policy language in accordance with the one appellate case precisely on point, the opinion of the Sixth Circuit in *Insurance Co. of North America* v. *Forty-Eight Insulations, Inc., supra.*[3]

Petitioner suggests that the Fifth Circuit's decision is inconsistent with three Louisiana cases holding that an insurance carrier is not liable for damages occurring outside the policy period. Pet. at 17. Reliance on these cases is misplaced because they do not involve the unique circumstances of a cumulative disease such as asbestosis. Moreover, the Fifth Circuit's decision is not inconsistent with these cases. The "injurious exposure" theory recognizes the medical fact that bodily injury occurs at or shortly after the initial inhalation of asbestos fibers and recurs whenever asbestos fibers are inhaled again. Thus, the Fifth Circuit opinion, which holds an insurer liable for bodily injury which occurs

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[3] Two district courts have reached differing results. *Compare* Keene Corp. v. Insurance Co. of North America, 513 F. Supp. 47 (D.D.C. 1981), appeal docketed, Nos. 81-1179 *et seq.* (D.C. Cir. 1981) (adopting injurious exposure theory) with Eagle-Picher Industries, Inc. v. Liberty Mutual Insurance Co., C.A. No. 78-2379-2 (D. Mass. Aug. 14, 1981) (adopting manifestation theory).

upon exposure *within* the policy period, is fully consistent with the Louisiana case law.

In any event, Petitioner's disagreement with the Court of Appeals' interpretation of state law does not raise issues worthy of review by this Court. *Huddleston* v. *Dwyer,* 322 U.S. 232, 237 (1944). A decision by this Court on these narrow state law issues would not bind other states and accordingly would have no nationwide significance.[4]

2. It is axiomatic that the interpretation of an insurance policy is governed by the language of the policy itself.[5] The decision of the Court of Appeals is unquestionably correct because the insurance policies expressly provide that it is the occurrence of bodily injury, not manifestation, which triggers insurance coverage. While the language of the policies varies slightly, the essential terms of each policy are the same. Coverage is provided for "bodily injury" defined as "bodily injury, sickness or disease . . . which occurs during the policy period." Pet. App. 32b.

Despite the clear language of the policies, Petitioner Aetna and other insurers cling to the position that the policies cover only liability arising from bodily in-

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[4] This Court has often recognized that the "final authority" on state law is the highest court of the state, whose interpretation of state law is binding on the Court. *E.g.*, Sandstrom v. Montana, 442 U.S. 510, 516 (1979).

[5] *E.g.*, Imperial Enterprises, Inc. v. Fireman's Fund Insurance Co., 535 F.2d 287, 290 (5th Cir. 1976); Hartford Fire Insurance Co. v. Shapiro, 270 Ala. 149, 117 So.2d 348, 352 (1960). This general rule is followed in Louisiana whose law governs the instant diversity action. *See, e.g.*, Martin v. Phillips, 356 So.2d 1016 (La. App. 1977).

jury which becomes "manifest" during the policy period. However, Petitioner can point to no language of the policy which limits coverage to "manifestation" of injury. Indeed, the pertinent policy language does not even mention the term "manifestation". Instead, the policies expressly provide for coverage based upon the occurrence of "bodily injury" during the policy period. To the extent that "bodily injury" occurs prior to "manifestation", as the Court of Appeals found with respect to asbestos-related injuries, the date of manifestation is simply irrelevant.

The policy language specifically provides coverage for "bodily injury" itself as well as for "sickness or disease". Petitioner Aetna, as a proponent of a manifestation theory, would read out of the policies altogether the coverage for "bodily injury" and require manifestation of a "disease". However, as the Sixth Circuit correctly recognized in construing the identical policy term, "It is tautological that bodily injury can be 'bodily injury' and is not necessarily just a 'disease'. The medical evidence is uncontroverted that 'bodily injury' takes place at or shortly after the initial inhalation of asbestos fibers." *Insurance Co. of North America* v. *Forty-Eight Insulations, Inc., supra,* 633 F.2d at 1222. Indeed, the courts have long recognized that for insurance coverage purposes, the term "bodily injury" includes any "localized abnormal condition of the living body". *See* Appleman, *Insurance Law and Practice* § 355 at 641 (1965). To the extent that such "localized abnormal condition" develops shortly after exposure to and inhalation of asbestos, regardless of when symptoms of disease ultimately manifest themselves, the policy language mandates coverage whenever exposure causes such "bodily injury" prior to manifestation.

Indeed, as the Sixth Circuit succinctly stated, "It requires only a straightforward interpretation of the policy language for us to adopt the exposure theory." *Insurance Co. of North America* v. *Forty-Eight Insulations, Inc., supra,* 633 F.2d at 1222. Adoption of the manifestation theory, on the other hand, as urged by Petitioner, would read out of the policy the critical terms "bodily injury". Such a strained construction of the policy language is obviously incorrect as a matter of law.

3. The decision of the Court of Appeals is also supported by the pertinent medical evidence which demonstrates that asbestos-related "bodily injury" occurs long before manifestation. The Fifth Circuit held, on the basis of extensive medical evidence, that bodily injury occurs during the course of exposure to and inhalation of asbestos, often many years prior to the time of manifestation. Pet. App. 30b. This relevant evidence showed that each time asbestos fibers are inhaled and become embedded in the lungs, scarring or walling off of the fibers takes place in lung tissue. The Court of Appeals thus concluded, "each introduction of fibers into Porter's lung was 'bodily injury', cumulatively and progressively more harmful to the victim." Pet. App. 30b.

Based on similar medical evidence, the Sixth Circuit had likewise concluded that "there is universal medical agreement that the time when asbestosis manifests itself is not the time when the disease occurred." *Insurance Co. of North America* v. *Forty-Eight Insulations, Inc., supra,* 633 F.2d at 1218, 1219. Rather, "bodily injury" takes place at or shortly after the inital inhalation of asbestos fibers and whenever asbestos fibers were subsequently inhaled, as the Fifth

Circuit correctly found. Coverage thus exists whenever competent medical testimony establishes that "bodily injury" occurred in a particular case.

The medical findings which were concurred in by the Court of Appeals must be accepted by this Court unless clearly erroneous.[6] Moreover, it is apparent that these medical findings were not clearly erroneous because similar findings have been made by other courts.[7] The medical testimony unequivocally supports the opinion of the Fifth Circuit.

4. The "exposure" theory adopted by the Fifth and Sixth Circuits, based on the policy language and the medical testimony, is administratively workable. Petitioner's contentions to the contrary are both exaggerated and speculative.

First, Petitioner contends that there will be difficulty in allocating control of the defense among the various insurers. Pet. 11. However, such difficulty exists in any multiple insurer situation and is not unique to the asbestos cases. The mere prospect of multiple defend-

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[6] Neil v. Biggers, 409 U.S. 188, 193 n.3 (1972); Blau v. Lehman, 368 U.S. 403, 408-409 (1962); Faulkner v. Gibbs, 338 U.S. 267, 268 (1949); United States v. Dickinson, 331 U.S. 745, 751 (1947); United States v. Commercial Credit Co., 286 U.S. 63, 67 (1932).

[7] Similar medical findings were made by the Fifth Circuit in Borel v. Fibreboard Paper Products Corp., 493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974), by the Sixth Circuit in Insurance Co. of North America v. Forty-Eight Insulations, Inc., *supra*, and by the United States District Court for the District of Columbia in Keene Corporation v. Insurance Co. of North America, 513 F. Supp. 47 (D.D.C. 1981), *appeal docketed*, Nos. 81-1179 et seq (D.C. Cir.).

ants or insurers provides no justification for review by this Court.

Second, Petitioner alleges that the defense counsel will have competing loyalties and therefore a conflict of interest. Pet. 11. The Court of Appeals for the Sixth Circuit correctly recognized that this is not "a significant problem in light of an attorney's duty to protect the interest of the insured." *Insurance Co. of North America* v. *Forty-Eight Insulations, Inc., supra,* 633 F.2d at 1225 n.25.

Finally, Petitioner alleges that disputes among insurers over apportionment may prevent settlements and result in increased litigation. This is mere speculation. Inasmuch as the apportionment formulas adopted by the Sixth and Fifth Circuits involve solely a *pro rata* calculation based on the proportion of claimant's injurious exposure period which was within an insurer's policy period, the formula is administratively simple and does not necessarily result in further litigation.

5. Petitioner's contention concerning the burden of proof is a mere hypothetical question because no burden of proof issue is present in the instant case. Indeed, Petitioner expressly concedes that "no burden of proof issue was presented in the *Porter case*". Pet. 21 n.17. Under such circumstances, it is this Court's well established practice to refuse to give advisory opinions on abstract, hypothetical questions which have no bearing on the issues in the case before it. *E.g., Alabama State Federation of Labor* v. *McAdory,* 325 U.S. 450, 461 (1945).

Petitioner's theory is that this Court can review the burden of proof issue—which is admittedly not present

in this case—because the Fifth Circuit in deciding this case agreed with the reasoning and result of a Sixth Circuit opinion, which, in addition to construing the policy term "bodily injury", reached additional holdings concerning a burden of proof issue that was present in the Sixth Circuit case. Petitioner's convoluted *non sequitur* falls of its own weight.

Moreover, Petitioner's argument contravenes the well established rule that "this Court . . . reviews judgments, not statements in opinions". *Black* v. *Cutter Laboratories,* 351 U.S. 292, 297 (1956); *accord, FCC* v. *Pacifica Foundation,* 438 U.S. 726, 734 (1978). Thus, even if the Fifth Circuit had made statements about the burden of proof, those statements would be unreviewable because they would have had no relation to the judgment. *A fortiori* the statements at issue here, which were not even made by the Fifth Circuit and have no relation to the judgment, are unreviewable on this Petition.

The statements of the Sixth Circuit on the burden of proof are properly reviewable only by writ of certiorari to the Sixth Circuit in the Sixth Circuit case. Petitions for a writ of certiorari have been filed in the Sixth Circuit case. *Insurance Co. of North America* v. *Forty-Eight Insulations, Inc., et al.,* 50 U.S.L.W. 3023 (U.S. July 31, 1981) (No. 81-198); *Liberty Mutual Insurance Co* v. *Forty-Eight Insulations, Inc., et al.,* 50 U.S.L.W. 3023 (U.S. July 31, 1981) (No. 81-199). Respondent Hartford has filed a brief *amicus curiae* in Nos. 81-198 and 81-199, in support of review of the burden of proof issue, and in opposition to review of the insurance coverage issues.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I Hereby Certify that on this 1st day of September, 1981, three copies of the foregoing Brief in Opposition of Respondent Hartford Accident and Indemnity Company were mailed by first class mail, postage prepaid to:

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APPENDIX

APPENDIX "A"

Companies Affiliated With Hartford Accident & Indemnity Company

The parent corporation of Hartford Accident & Indemnity Company is Hartford Fire Insurance Co., a subsidiary of International Telephone and Telegraph Corp. The following corporations are also subsidiaries of Hartford Fire Insurance Co.: Pacific Insurance Co., Ltd.; Sentinel Insurance Co., Ltd.; Hartford Casualty Co.; New York Underwriters Insurance Co.; Twin City Fire Insurance Co.; London Canada Insurance Co.; Hartford Life and Accident Insurance Co.; First State Insurance Co.; Great Eastern Insurance Co., Ltd.; and London and Edinburg General Insurance Co. of Canada.

Amicus Brief

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No. 81-200
IN THE

Supreme Court of the United States

October Term, 1981

AETNA CASUALTY AND SURETY COMPANY,

Petitioner,

vs.

CHARLES J. PORTER, AMERICAN OPTICAL CORPORATION, HARTFORD ACCIDENT & INDEMNITY COMPANY, CONTINENTAL INSURANCE COMPANY, and AMERICAN MOTORISTS INSURANCE COMPANY,

Respondents.

Motion for Leave to File Brief Amicus Curiae and Brief in Opposition Amicus Curiae.

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Respondents.

Motion for Leave to File Brief Amicus Curiae

American Home Assurance Company; National Union Fire Insurance Company of Pittsburgh, Pa.; Granite State Insurance Company; AIU Insurance Company; The Insurance Company of the State of Pennsylvania; New Hampshire Insurance Company and Lexington Insurance Company hereby request leave to file the attached Brief in Opposition to the Petition for Certiorari based upon the following:

1. Amici are insurance companies who have, at varying times, issued excess general liability policies to various manufacturers of products containing asbestos.

2. Amici have been sued by their insureds and other insurers in the following cases presently pending in the State Courts of California:

(a) *G.A.F. Corporation vs. Insurance Company of North America, et al.* (No. C 286217) (Los Angeles County)

(b) *Armstrong Cork Company vs. Aetna Casualty and Surety Company* (No. C 315357) (Los Angeles County)

(c) *Fireman's Fund Insurance Company vs. Fibreboard Corporation, et al.* (No. 753885) (San Francisco County)

(d) *Johns-Manville Corporation, et al. vs. The Home Insurance Company, et al.* (No 765226) (San Francisco County).

3. In each of these cases the insured has *inter alia* sought a judicial declaration regarding the proper construction of certain terms of the respective policies. Specifically, the cases to a large extent turn on whether or not the California Courts find that the "exposure" or the "manifestation" theory of coverage applies in construing the term "occurrence" in these policies.

4. All four of these cases have recently been coordinated for all purposes before a single state judge pursuant to the California Rules of Court (designated as "Coordination Proceeding No. 1072"). The cases are presently in varying stages of pre-trial discovery.

5. In each case, *amici* have urged that the exposure theory of coverage is the correct construction of their respective policies under applicable state law.

6. The consent of the attorney for Petitioner has been requested but refused.

7. Amici believe that plenary review by this Court of any of the questions presented is unwarranted, and if

granted, may have a significant impact on the course of the litigation in California in which they are parties.

Respectfully submitted,

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Respondents.

Amicus Curiae Brief in Opposition.

Amici Curiae American Home Assurance Company; National Union Fire Insurance Company of Pittsburgh, Pa.; Granite State Insurance Company; AIU Insurance Company; The Insurance Company of the State of Pennsylvania; New Hampshire Insurance Company; and Lexington Insurance Company, respectfully urge that this Court refuse plenary review in this case and in part deny the Petition for Writ of Certiorari, seeking review of the Fifth Circuit's opinion in this case.

REASONS WHY THE WRIT SHOULD BE DENIED AND PLENARY REVIEW NOT GRANTED.

1. This Case Does Not Involve Federal Questions and Is Not, as a Practical Matter, Worthy of Plenary Review by This Court.

The Petition seeks plenary review of essentially two holdings[1] of the Court of Appeals: First, whether under Louisiana law the contract should be construed as providing coverage on an "exposure" basis; and second, whether the Court below properly decided and allocated the burden of proof between insurer and insured regarding the existence of coverage in these cases. For the reasons that follow, we believe that the Petition should be denied with respect to the former and granted and simultaneously remanded with instructions regarding the latter.

Petitioner recognizes that this case involves the interpretation of standard form liability insurance policies as applied to asbestos-related diseases and that state law controls the interpretation of policies. Petitioner urges that this Court find exceptional circumstances here and grant full review of the decision below. They argue that this case is worthy of review because of its overall impact on the nation's judicial system and the insurance industry (Pet. 12).

Although it is true that a large volume of lawsuits claiming asbestos-related injuries have been filed in the United States, this fact obviously will not be altered by granting the Petition or, for that matter, by reversing the Fifth Circuit's opinion. Nor will a decision on the merits resolve, on a national basis, the exposure versus manifestation dispute. At best,

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[1]Although three questions are actually presented for review, the second appears to be a repeat of the first without the emphasis of reliance upon an opinion from another federal court.

a decision on the merits will affect Louisiana cases and perhaps settle Louisiana law on the coverage question.

Petitioner speculates that the underlying litigations will be complicated if the Petition is not granted. Even if true, the effect of a decision on the merits by this Court would, of course, only have a direct effect on cases pending in the Louisiana Courts or cases to be tried under Louisiana law. This is precisely why diversity cases involving questions of state law alone rarely warrant review by this Court and this case is no exception. Also, there is simply no reason to assume that insureds and insurers will not join together in defense of these claims. Indeed, this has occurred to a great extent in California.

It is true that many persons have been harmed as a result of exposure to products containing asbestos. And it is also true that the administration and, if necessary, the adjudication of these claims may place substantial strains on the insurance industry and the courts. These administrative burdens are unfortunately inescapable and they will not be appreciably diminished by the granting of the Petition.

Nevertheless, Petitioner suggests that the Court of Appeals' opinion adopting the exposure theory will exacerbate these problems (Pet. 11-12). Assuming this as a fact, however, lends no support to the Petition because inconvenience to the courts simply is not a proper judicial consideration in construing private contracts.

2. The Court of Appeals' Decision That Louisiana Law Would Require the Coverage to Be Apportioned on an "Exposure" Basis Is Correct.

The Court of Appeals was presented with the issue of when "bodily injury" occurs (as those terms are defined in the general liability policies) in a claimant who has contracted an asbestos-related disease. There are no authori-

tative Louisiana decisions resolving this issue, and therefore, the Court of Appeals properly attempted to anticipate what a Louisiana court would decide in a like case. The Court below did not reach this decision in a vacuum. Recognizing that no state law applied, it adopted the reasoning of the Sixth Circuit in *INA v. Forty-Eight Insulations, Inc.*, 633 F.2d 1212 (1980)[2]. The Sixth Circuit carefully evaluated policy considerations which are universally established in state law, as well as relevant factual findings to conclude that the exposure theory applied.

In the absence of established state law, federal courts can and must make educated estimates of what the state courts would decide under like circumstances. The decision below, by adopting the Sixth Circuit opinion, thoroughly considered the authorities presented, as well as the obvious policy considerations which, of course, would have presumably been considered by a Louisiana court. For example, the court in adopting the Sixth Circuit opinion was guided by the universal state law precedents (including Louisiana) that contracts are to be liberally construed in favor of the insured and against the insurer, and if there are ambiguities in the policy or uncertainty over its interpretation, the policy is to be construed against the insurer and in favor of the insured.

In discharging its responsibilities under *Erie*[3] and by adopting the Sixth Circuit opinion, the Court below correctly concluded that the "analogous" decisions presented by Petitioner did not resolve the manifestation versus exposure controversy in the context of applying general liability pol-

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[2]It is clearly recognized that the law of other jurisdictions is relevant in deciding an issue where no applicable state law applies. *Calcasieu-Marine Nat. Bank, etc. v. American Employers' Insurance Co.*, 533 F.2d 290 (Fifth Circuit, 1976).

[3]*Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938).

icies to asbestos-related claims. The Fifth Circuit reviewed, analyzed and rejected these decisions because the medical evidence, the expectations of the parties and the fundamental state policies applied in the asbestos-related injury context compelled a finding that the exposure theory would be adopted by the Louisiana Courts. The Fifth Circuit chose to express itself by the method of adopting a neighboring jurisdiction's opinion. The result obtained is no less valid.

The Sixth Circuit properly determined that the manifestation rule which applies in the worker's compensation cases would not be applied by New Jersey and Illinois Courts to liability insurance cases. The administrative considerations which are the fundamental basis for the "last employer pays" rule in worker's compensation cases do not outweigh the rules of contract interpretation applicable to liability insurance coverage cases. The Fifth Circuit reached the same decision in regard to Louisiana law.

Petitioner presents certain property damage cases to support the conclusion that the manifestation theory is correct. The Fifth Circuit realized that this issue was presented to and rejected by the Sixth Circuit because in these property damage cases, no damage or injury *of any* kind took place until manifestation. The Sixth Circuit specifically rejected the Louisiana case presented by Petitioner in this case. (*Oceanomics, Inc. v. Petroleum Distrib. Co.*, 280 So.2d 874 (La.App. 1973).)

Recognizing the Louisiana rule favoring coverage, the Fifth Circuit rejected the Statute of Limitation cases which were also advanced by Petitioner. Transposing the state rule limiting actions only after the disease or injury was manifested to the asbestos area would entirely undercut the reason for the rule in the first place — to promote coverage. The Fifth Circuit chose to express its result in terms of the Sixth Circuit opinion. This practice is absolutely acceptable.

The Fifth Circuit thoroughly analyzed all the relevant state law and carefully evaluated the purposes of various analogous decisions. In the absence of any Louisiana precedent, the Fifth Circuit properly fulfilled its responsibility to determine what the state courts would do with a similar case and arrived at a reasonable prediction of Louisiana law. That decision should therefore be left undisturbed. *Spiegel's Estate v. Commissioner of Internal Revenue*, 335 U.S. 701 (1949).

3. The Court of Appeals Erroneously Decided and Allocated the Burden of Proving Coverage in This Case.

In adopting the Sixth Circuit opinion, the Fifth Circuit did depart from "the general rule . . . that the burden of proof to show coverage is on the insured" (*INA v. Forty-Eight Insulations, Inc.*, 633 F.2d 1212, 1225) and the Fifth Circuit "simply reverse[d] the ordinary burden of proof and place[d] it on the insurer." (633 F.2d 1212, 1226 n. 27).

Although we disagree with the Court's ruling in this respect,[4] we do not urge that the Petition be granted to review this aspect of the Sixth Circuit's decision. Rather, we urge this Court to vacate this portion of the opinion and remand the case with instructions to "ascertain from all the available data what the state law is and apply it". *West v. American Telephone & Telegraph Co.*, 311 U.S. 223, 237 (1940).

A remand is in order because it is unclear whether the Court below simply ignored the state law or concluded that its holding actually reflected the law of the state on this issue. This question is accentuated by the fact that the Sixth

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[4]Amici agree with petitioner that the Court below erred in this ruling and should review be granted, we would support reversal of that decision based upon the principles of *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), and the authorities pointed out by petitioner.

Circuit apparently did not have the benefit of briefs or argument from counsel regarding the allocation of the burden of proof under Illinois law. (See Petition of Liberty Mutual in No. 81-199 at 10 n. 11). Under these circumstances, it is entirely appropriate for this Court to simultaneously grant the Petition, vacate this portion of the opinion, and remand for full consideration of the state law in this area. Indeed, it may be necessary that the case be remanded to the District Court on this question in that it was raised *sua sponte* by the Court of Appeals. See: *Singleton v. Wulff*, 428 U.S. 106, 120 (1976).

Conclusion.

Based upon the foregoing arguments and authorities, *amici* respectfully request that this Court 1) deny the Petition as to questions one and two and, 2) grant the Petition with respect to the third question presented and thereafter remand the case to the lower court with instructions as deemed proper to insure thorough consideration of the state law bearing on this issue.

Respectfully submitted,

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